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EDITOR'S NOTE

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85-93

Title: United States, et al., Petitioners
v.
William C. Friday, et al.

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Manning Jr.,Howard C.

try	Date	Note	Proceedings and Orders
1	Jul 2 1985		Application for extension of time to file petition and order granting same until September 12, 1985 (Chief Justice, July 5, 1985).
2	Sep 12 1985	G	Petition for writ of certiorari filed.
3	Oct 17 1985		Brief of respondents William C. Friday, et al. in opposition filed.
4	Oct 23 1985		DISTRIBUTED. November 8, 1985
5	Oct 30 1985	X	Reply brief of petitioners United States, et al. filed.
6	Nov 5 1985	X	Reply brief of petitioners P.E. Bazemore, et al. filed.
			VIDED.
7	Nov 12 1985		Petition GRANTED. The case is consolidated with 85-93 and a total of one hour is allotted for oral argument.
			**********
9	Dec 20 1985		Order extending time to file brief of petitioner on the merits until January 10, 1986.
0	Dec 20 1985		Above extension applies to all petitioners.
1	Jan 10 1986		Brief amicus curiae of AFL-CIO, et al. filed. VIDED.
2	Jan 13 1986		Lodging received. 10 boxes.
3	Jan 10 1986		Brief of petitioners United States, et al. filed. VIDED.
4	Jan 15 1986	G	Motion of the Solicitor General for divided argument filed.
5	Jan 22 1986		Joint appendix filed. VIDED.
6	Jan 27 1986		Motion of the Solicitor General for divided argument GRANTED. and the Solicitor General is allotted twelve minutes for oral argument and petitioners Bazemore, et al. are allotted 18 minutes for oral argument.
7	Jan 28 1986	D	Motion of respondents for divided argument filed.
8	Feb 13 1986		Brief amicus curiae of Equal Employment Advisory Council filed. VIDED.
0	Feb 13 1986		Order extending time to file brief of respondent on the merits until February 21, 1986.
2	Feb 21 1986		Brief of respondents William C. Friday, et al. filed. VIDED.
3	Feb 24 1986		Motion of respondents for divided argument DENIED. Justice Brennan would grant this motion.
4	Feb 15 1986		Record filed.
5	Feb 15 1986		21 boxes of original records received from 4th Circuit.
6	Feb 19 1986		Application for leave to file respondents' brief on the merits in excess of the page limitation filed (A-635), and order granting same by Burger, C.J., on Feb. 20, 1986. The brief may not exceed 56 pages.

85-428-CFX

ry	Date	Note	Proceedings and Orders
	Mar 14 1986		SET FOR ARGUMENT, Tuesday, April 22, 1986. (1st case)
	Mar 14 1986		CIRCULATED.
	Apr 15 1986	X	Reply brief of petitioners United States, et al. filed.
			VIDED.

PETITION FOR WRIT OF CERTIORARI

85-428

No.

Supreme Court, U.S.
FILED
SEP 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether black state employees establish a claim under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), by identifying current salary disparities between themselves and white employees holding the same jobs, when such disparities result from a state policy before 1965 of paying blacks lower salaries than whites.

PARTIES TO THE PROCEEDING

The parties to this proceeding are identified in the petition filed by the private plaintiffs in this case, No. 85-93, at pages iii-vi.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, the Secretary of Agriculture, and the Deputy Director of the Science and Education Administration Extension, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 346a-481a)[1] is reported at 751 F.2d 662. The opinions of the district court (Pet. App. 3a-207a, 216a-345a) are unreported.

[1] "Pet. App." refers to the appendix in No. 85-93, filed by the private plaintiffs below.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 1a-3a) was entered on December 10, 1984. Rehearing was denied on April 15, 1985 (Pet. App. 482a). On July 5, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer * * * to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race * * *.

STATEMENT

1. The North Carolina Agricultural Extension Service provides services to state residents involving the dissemination of useful information relating to agriculture and home economics, *e.g.*, through educational programs for farmers and sponsoring 4-H and extension homemaker clubs (Pet. App. 7a, 12a-20a). It is funded jointly by the United States Department of Agriculture, the State of North Carolina, and the various counties in the State (Pet. App. 7a-8a). Agricultural extension agents, professional employees at the county level, are in three ranks: agent, associate agent and assistant agent (Pet. App. 17a). The three ranks perform "essentially the same types of tasks", although the agents have more responsibility and are expected to maintain higher performance levels than associate agents, the intermediate position, or assistant agents, the entry level position (Pet. App. 17a).

Until August 1965, the Service was divided into "a white branch * * * and a Negro branch * * * composed entirely of black personnel [serving] only black farmers, homemakers and youth" (Pet. App. 27a). Although black and white county agents had identical responsibilities and job descriptions (Pet. App. 29a), "[t]he salaries of black agents * * * were lower than the salaries of their white counterparts" (Pet. App. 30a).

The two branches of the Service were merged on August 1, 1965; the disparities between the salaries of equivalent black and white agents who were already employed remained, although no racial distinction was made in the initial salaries of agents hired after the merger (Pet. App. 31a, 359a). In 1972, when the Service and other public employers became subject to Title VII, "[s]ome pre-existing salary disparities continued to linger on" (Pet. App. 360a).[2] The court of appeals noted in December 1984 that "the Extension Service admits that, while it had made some adjustments to try to get rid of the salary disparity resulting on account of pre-Act discrimination, it has not made all the adjustments necessary to get rid of all such disparity" (Pet. App. 389a-390a).

Since the merger, the Service has established a minimum salary level for all new county agent posi-

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[2] A memorandum prepared by Dr. Blalock, an Assistant Director of the Service in early 1971, stated that black professionals earned $800-$1,100 less annually than comparable whites because of "the competitive market," "tradition" and "less county support for non-white positions" (C.A. App. 1606, 1608; Pet. App. 439a-440a).

tions. Newly hired agents with advanced degrees, prior relevant experience or particularly needed skills are paid more than the minimum. Moreover, each agent's salary reflects a contribution by the county in which he is employed, the amount varying from county to county. Pay increases awarded by the county or the state may be in the form of an equal sum to each employee, or as a percentage of the salary. Finally, the state and some counties provide for merit pay increases and increases to offset inflation. Pet. App. 360a-362a.

The position of county extension chairman was created shortly before the merger, by making the white county agents responsible for coordinating the entire extension program in their respective counties (C.A. App. 1001-1002, 1783). Although there were black county agents in 51 of North Carolina's 100 counties, each of the initial chairmen selected was a white (C.A. App. 1745; GX 75).[3] In November 1972, the Service introduced a system of announcing job vacancies and accepting applications for county chairman positions (Pet. App. 24a-25a, 75a).[4] Applicants who possess the minimum qualifications for county chairman are interviewed by Service officials, who then make a recommendation to the board of county commissioners (Pet. App. 25a-26a, 76a-77a). The county generally accepts the recommendation (C.A. App. 171), but "all appointments are worked

[3] No black was appointed to a county chairman position until March 1971, after 151 whites had been appointed (C.A. App. 1745; GX 75).

[4] Before that time, county chairmen had been selected from a list of possible candidates prepared by the Assistant Director for County Operations and the district chairman of the pertinent district (C.A. App. 165).

out jointly between the Extension Service and the commissioners and no official action can be taken unilaterally by either party with respect to filling a vacancy" (Pet. App. 77a). In some instances, the Service recommends more than one candidate to the county (*ibid.*). Few black applicants have been selected as county chairmen, and none has been selected in preference to a white male applicant.[5]

Prior to 1965, the Service had established separate all-white and all-black 4-H and extension homemaker clubs. After 1965, the Service requested a formal assurance from each such club that it would not discriminate on the basis of race, color, or national origin (GX 115, at 3). However, most of the clubs have continued to operate on a single-race basis.

2. This suit was started in November 1971 by more than 50 black employees of the Service, alleging, inter alia, intentional racial discrimination in employment in violation of the Fourteenth Amendment of the Constitution, 42 U.S.C. 1981.[6] The United States intervened in the action on April 7, 1972; its complaint in intervention, as amended, alleged racial discrimination against black employees in violation of the Fourteenth Amendment, Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d and Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (Pet. App. 4a-5a, 35a). Plaintiffs asserted intentional racial discrimination in various incidents of employment, such as salaries, job assignments and promotions, and in the selection

[5] See page 7, *infra*.

[6] The complaint was subsequently amended to include claims under Title VII (Pet. App. 35a).

of county chairmen, as well as in the continued support of single-race 4-H and extension homemaker clubs (Pet. App. 49a-51a). The employment-related claims included individual claims of discriminatory treatment as well as allegations of intentional patterns and practices of discrimination (Pet. App. 49a-52a, 227a-339a). The private plaintiffs also sought class certification of the case under Fed. R. Civ. P. 23 (Pet. App. 33a-34a).

The case was tried to the court for 10 weeks starting in December 1981. The evidence introduced by the United States included multiple regression analyses [7] comparing the salaries of black and white agents in 1974, 1975 and 1981.[8] These regressions used four independent variables—race, education, tenure and job title—and showed a statistically significant racial effect for 1974 (C.A. App. 1601, 402-403) and 1975 (C.A. App. 1589, 416). Defendants also presented multiple regression analyses for 1975 and 1981, showing similar results. In addition, defendants presented regressions that added quartile rank, a measure of job performance, as an independent variable.[9] Doing so for 1975 increased the race effect (C.A. App. 1716

[7] A multiple regression analysis is a statistical method of determining the effect of several variables upon a particular dependent variable, such as salary. See M. Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737 (1980). A regression permits simultaneous consideration of a number of independent variables.

[8] These analyses compared the salaries of county agents hired after the Service was consolidated, as well as those hired before that date.

[9] Quartile rank is used in determining merit salary increases (Pet. App. 113a-115a, 363a, 384a-385a).

(analysis 6)). This result was statistically significant.[10]

In addition to the statistical evidence of salary disparities, the government introduced statistical and other evidence relating to the selection of county chairmen. The evidence established that between November 1972, when the first vacancy announcement appeared, and October 1981, 77 county chairmen were selected, of whom 72 were white and 5 were black (C.A. App. 1736-1740, 919-920). [11] No blacks were selected before July 1, 1976, and only 2 of the 5 blacks selected between November 1972 and that date competed with a white applicant, in each case a white female; no black has ever been selected when there was a white male applicant (C.A. App. 1736-1740, 1003, 1006; GX 172, at 94-95; see C.A. Br., Table 7, at 10a-11a).

Plaintiffs also introduced evidence showing that although the size of the 4-H club system has varied considerably over the years, there have been more than 1,000 all-white clubs each year since 1972 (C.A. App. 2237; GX 11), and more than 850 single-race clubs in communities identified by defendants as "ethically mixed" (C.A. 1807). The extension homemaker clubs also remain largely single-race clubs (C.A. App. 1797-1807; Tr. 941-942, 1524-1525, 2390, 2449-2450).

[10] The level of significance was .0003, *i.e.*, there was less than one chance in 3,000 that the race effect was due to chance (C.A. App. 1713-1714).

[11] Several blacks testified that they had not sought chairmanships because they believed that it would be futile to do so (Pet. App. 93a). Each of the blacks who did apply met the objective qualifications for county chairman. Several whites who did not meet those qualifications have been made chairmen (C.A. App. 170).

3. The district court denied class certification (Pet. App. 38a-46a), asserting that "for all intents and purposes the suit became a class action" when the United States intervened (Pet. App. 45a). The court ruled that class action certification "is inappropriate and unnecessary in pattern and practice suits" brought by the government under Title VII (Pet. App. 45a-46a), noting that "[i]f the government prevails herein the relief granted can be as broad as any that could be granted in any private class action suit" (Pet. App. 46a (footnote omitted)).

The district court, however, ultimately rejected all claims of the private plaintiffs and the United States. It held that no pattern or practice of racially discriminatory treatment in the salaries of county-level employees had been shown. Noting that "[i]t is undisputed that" before the merger of the black and white branches, the Service paid black agents less than white ones, and although "steps were taken to begin [the] elimination" of this disparity before the Service was covered by Title VII in 1972, the court recognized that "the government has offered evidence tending to show that as of January, 1973, the salaries of numerous black agents throughout the system were less than those of white agents in the same counties who were in comparable or lower positions and who had comparable or less tenure * * * [and] defendants' own exhibit [showed] some salary disparities between blacks and whites as late as October, 1974" (Pet. App. 120a-121a). The district court nevertheless found that "while on its face [the] evidence unquestionably establishes salary disparities, when viewed in the light of defendants' explanatory evidence it fails to prove discrimination" (*id.* at 122a-

123a).[12] The court described plaintiffs' regression analyses showing a continuing racial disparity in salary levels as flawed primarily because they failed to account for job performance (Pet. App. 134a).[13] In sum, the court "conclude[d] that the plaintiffs had probably made out a prima facie case with respect to defendants' promotions and salary practices * * * [but] the defendant * * * articulat[ed] plausible reasons for its actions * * * which the court found convincing" (Pet. App. 190a).

The district court also held that the plaintiffs failed to establish a prima facie case of racial discrimination in the selection of county chairmen, and that "in any event the defendants have effectively rebutted plaintiffs' case by showing the inaccuracy and insignificance of plaintiffs' proof" (Pet. App. 100a). The court found that although 77 county chairman posi-

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[12] Before analyzing the statistical data, the court explained its approach to the interpretation of the requirements of the Civil Rights Act of 1964 (Pet. App. 121a-122a):

> Just as it had been found in the area of education that there is no such thing as instant integration, it was soon found in the field of business and industry that there is no such thing as instant [e]quality in employment. Without risking serious disruption of a business by prohibitively costly budgetary alterations and a possible practice of wholesale reverse discrimination it was soon recognized (though not always by the courts) that the adjustments mandated by the law simply could not be made overnight.

Thus, the defendants' "explanatory evidence" as to blacks hired under the dual system apparently included the historical fact of discrimination.

[13] The court was also troubled by what it perceived as the erroneous failure of the analyses to account for nine other, somewhat overlapping variables, relating to merit and cost of living raises that varied between counties, prior experience, and market demands for particular kinds of experience.

tions had been filled since the institution of statewide vacancy announcements in 1972, blacks had applied for only 18 of those positions (Pet. App. 78a); finding the selection rate for blacks to those 18 positions acceptable (Pet. App. 86a), the court held that the Service's selection procedures for county chairman have, since 1972, been applied in a nondiscriminatory manner (Pet. App. 101a). The court rejected plaintiffs' claim that blacks had been deterred from applying for chairmanships (Pet. App. 99a), and also rejected all individual claims of discrimination in promotions to county chairman (Pet. App. 227a-317a).

As to the claim that the Service permitted segregated 4-H clubs and extension homemaker clubs to be maintained in North Carolina, recognizing and providing services to such clubs, the district court found that "there are many clubs to which members of both races belong" (Pet. App. 165a) and that "[i]f any individual has become a member of a club composed only of members of his or her own race, it has been an entirely voluntary act" (Pet. App. 172a). The court found no evidence of any denial of membership or discrimination in services on the basis of race, and concluded that the law does not require that these clubs be integrated (Pet. App. 165a-185a). The court ruled that the evidence did not demonstrate any discriminatory intent on the Service's part in tolerating the single-race clubs (Pet. App. 179a-182a), and that the Service did not violate the law in opting to "continue to provide its much needed services to [all] club members while striving to achieve full integration of the clubs [rather than to] withdraw such services altogether" (Pet. App. 184a-185a).

4. The court of appeals affirmed, Judge Phillips dissenting in part. The panel majority agreed with

the district court's conclusion that before the Civil Rights Act became applicable to the Service, blacks were paid less than whites performing the same jobs, and that even after the Service became subject to the Act "[s]ome pre-existing salary disparities continued to linger on" (Pet. App. 360a). It stated succinctly that (Pet. App. 380a):

> The plaintiffs claim that the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not. We do not think this is the law.

The panel majority relied for its view on *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), as well as a number of court of appeals decisions following *Evans* in rejecting time-barred claims with continuing effects on seniority rights (Pet. App. 381a-382a).[14]

This view of the Act's requirements led the panel to fault all of the regression analyses of the county-level salaries of all current black employees—recent hires as well as pre-act hires—because the figures analyzed "reflect the effect of pre-Act discrimination" (Pet. App. 389a (footnote omitted)). For this reason, as well as because "both experts omitted from their respective analysis variables which ought to be reasonably viewed as determinants of salary", the analyses were "unacceptable as evidence of discrimination" (Pet. App. 391a).

The panel majority also ruled that "the employment decisions made by the Extension Service with respect to the selection of County Chairmen were

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[14] *Fowler* v. *Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979); *Trabucco* v. *Delta Airlines*, 590 F.2d 315 (6th Cir. 1979); *Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1054 (2d Cir. 1977).

made when the Service either recommended or did not recommend an applicant for an existing vacancy to the County Commissioners" (Pet. App. 405a-406a). It therefore examined the data as to the Service's recommendations, rather than the selection statistics relied on by plaintiffs or the district court (Pet. App. 412a-415a).[15] The majority determined, with respect to those positions for which there were black applicants, that "the Extension Service recommended essentially the same percentage of black applicants as it did white applicants" (Pet. App. 415a). It also examined the data as to *all* applications for *all* vacancies—"the proper way to consider the applicant flow data" (Pet. App. 418a)—and drew a similar conclusion (Pet. App. 421a). The court therefore held that the Service's decisions as to county chairmen selections were made "in as evenhanded a way as could be imagined" (Pet. App. 423a).

Finally, the panel majority held that the district court "correctly denied the plaintiffs' claim with respect to the alleged affirmative duty to require integrated membership" in 4-H clubs and extension homemaker clubs because, absent proof of intentional discrimination, "the mere existence of all white and all black * * * [c]lubs in some racially mixed communities" does not violate the law (Pet. App. 424a n.128). The panel majority also affirmed the denial of class certification, stating inter alia (Pet. App. 366a-367a):

> the intervention of the government in the case, asserting its broad pattern or practice claims

[15] On appeal, we challenged the district court's analysis, arguing that the court erred in excluding vacancies for which only whites applied while including vacancies for which only blacks applied. The court of appeals majority declined to resolve our objections (Pet. App. 412a) in view of its alternative approach.

> which would have required relief as broadly based as the claimed plaintiffs' classes would have received, made it possible for the plaintiffs to introduce all evidence they would have been able to introduce had the classes been certified. All the questions on the merits were also presented to the court which would have been presented had the classes been certified. Thus, in a practical sense at least, even if not in a technical one, the complaint on appeal on account of failure of class certification may seem to be of little moment or was made moot by the intervention of the government.

5. Judge Phillips dissented from the majority's dismissal of the salary claims (Pet. App. 425a, 433a-469a). He also dissented from the dismissal of the 4-H club claims (Pet. App. 469a-481a), and the refusal to certify a class (Pet. App. 426a-433a). With regard to the salary claims, he pointed out that "undisputed evidence"—including a memorandum by then Assistant Director Blalock (see note 2, *supra*)—showed that the salary differentials continued "well past 1968 (the earliest limitation date applicable to the salary claim)." Pet. App. 438-439a.[16] The regression analyses of both plaintiffs' and defendants' experts were, moreover, "wholly consistent" in showing a substantial, across the board race-based disparity (Pet. App. 449a-450a), which was not rebutted by any "*evidence* that the inclusion of other relevant variables *would in fact* reduce the race-effect coefficient to a statistically insignificant level" (Pet. App. 450a-451a (emphasis in original)). Defendants' hy-

[16] As Judge Phillips recognized, the complaint, filed in November 1971, included claims based on the Constitution and Title VI, applicable to the states since 1964. A three-year limitation period applies to those claims. *Cox* v. *Stanton*, 529 F.2d 47, 49-50 (4th Cir. 1975).

potheses about possible explanations should not have sufficed to overturn this clear showing. In sum, Judge Phillips concluded that "the only rational assessment to be made of the evidence in this record" (Pet. App. 456a) is that "of course the general pattern of pre-1965 overt discrimination in salary continued in substantial, if gradually diminishing, degree until at least 1976 and perhaps beyond", and that responsible Service officials knew that such a race-based pattern continued and failed to correct it (*id.* at 455a-456a). The majority's failure to award relief on such a record must, then, result from "misapprehensions of controlling legal principle" (*ibid.*), including the identification of the "relevant time frame within which the existence of a pattern or practice of salary discrimination was to be assessed" (Pet. App. 457a). Thus, although the district court focused on whether a discriminatory pattern or practice continued to exist at the time of trial in 1981, the real issue was whether there was such a pattern at any time after 1972, or even 1968 (see note 16, *supra*). In addition, Judge Phillips disagreed with the panel majority's reading of *Hazelwood* and *United Airlines, Inc.* v. *Evans*, *supra*, as applicable to plaintiffs' salary claims (Pet. App. 462a-467a). Those cases, Judge Phillips explained, do not permit an employer to "continue practices now violative simply because at one time they were not. * * * * * Indeed, with respect to pay and other 'condition of employment' claims, as opposed to hiring and other work-force composition claims, it may well be argued that the [*Hazelwood-Evans*] principle simply has no logical application" (Pet. App. 465a-466a).

6. Rehearing en banc was denied by an equally divided court. The private plaintiffs filed a petition for certiorari on July 15, 1985 (No. 85-93), seeking review of the judgment of the court of appeals.

REASONS FOR GRANTING THE PETITION

1. We agree with the private petitioners that the court of appeals incorrectly decided that Title VII provides no remedy to black employees hired before the effective date of the Act, when the Service maintained two separate, racially segregated branches and paid blacks less on account of their race, and who as a result have received, and today receive, lower salaries than white employees performing the same jobs with the same amount of experience. The decision of the court of appeals creates a conflict in the circuits and denies the private petitioners protection to which they are entitled under Title VII. Accordingly, we believe this Court should grant certiorari to review this issue.[17]

The courts of appeals have consistently recognized that pre-Act, intentional discrimination cannot be used to justify the post-Act payment of lower salaries to blacks than to similarly situated white employees. See, *e.g.*, *Lamphere* v. *Brown University*, 685 F.2d 743, 747 (1st Cir. 1982); *Clark* v. *Olinkraft, Inc.*, 556

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[17] We recognize that this issue is a rather narrow one, and that this Court's resolution of that issue will not obviate the need for further proceedings. In the first place, the question involves the effect on current employees of employment practices to which they were subjected before they became entitled to the Act's protections. The issue is thus of diminishing importance except insofar as its resolution may serve as an analogy in addressing similar questions that arise with respect to time-barred post-Act claims. Cf. *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977). Secondly, as both courts below concluded, the "lingering effects" of pre-Act discrimination here are buried in a complex matrix of post-Act salary decisions, such as merit raises, cost of living increases, and county-to-county variations in salary increases (Pet. App. 109a-116a; 360a-362a). The extent of the actual discriminatory effect on any employee is thus presently unclear.

F.2d 1219, 1222 (5th Cir. 1977); *International Union of Electrical Workers* v. *Westinghouse*, 631 F.2d 1094 (3d Cir. 1980); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 437-438 (D.C. Cir. 1976); *Norman* v. *Missouri Pac. R.R.*, 414 F.2d 73, 84-85 (8th Cir. 1969); cf. *Bartelt* v. *Berlitz School of Languages*, 698 F.2d 1003, 1004 (9th Cir. 1983) (time-barred establishment of discriminatory salary); *Jenkins* v. *Home Insurance Co.*, 635 F.2d 310, 312 (4th Cir. 1980) (same).

This Court's decisions in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), upon which the court below relied, should properly be distinguished from the pay issue in this case. Those cases establish that pre-Act or time-barred *hiring* decisions cannot form the basis for a claim under Title VII, even when those decisions have continuing current effects due to the operation of a bona fide seniority system.[18] Similarly, pre-Act promotion decisions cannot be challenged under Title VII on the theory that the claimant who should have received the promotion now continues in a lesser job at a salary level below that that he would have obtained had he not been the victim of pre-Act discrimination.[19] Hir-

[18] Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h) validates only "bona fide seniority systems." If the employee can show that the seniority system was adopted with a discriminatory intent, Section 703(h) affords the employer no protection. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 276-277 (1982). This Court has emphasized that Section 703(h) "makes no distinction between seniority systems adopted before its effective date and those adopted after its effective date" *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 76 (1982).

[19] As the private petitioners note (85-93 Pet. 23-24), there appears to be a conflict in the circuits over whether the

ing and promotion decisions are discrete acts, taken once and for all at a single moment in time. If the discriminatory hiring or promotion decision occurred prior to the passage of the statute or beyond the horizon of the statute of limitations, it can not be the subject of suit, even though the consequences of that decision may well continue to the present. Indeed it could scarcely be otherwise, unless the Act is, as a practical matter, to have retroactive application and relief for past illegalities is to be available into the indefinite future. For better or worse unlawful discriminatory hiring and promotion decisions must either be timely complained of or be taken to have fixed a person's situation once and for all—unless, of course, fresh illegalities are subsequently committed.

discriminatory denial of promotion constitutes a continuing offense. That dispute is only over whether the employee can rely on a *continuing practice* of discriminatory denials of promotion to avoid a statute of limitations defense, or whether he must file within the statutory period after he is himself denied promotion. Compare, *e.g.*, *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978) (continuously maintained illegal employment policy may be subject of complaint until statutory time "after the last occurrence of an instance of that policy", citing cases) and *Patterson* v. *American Tobacco Co.*, 586 F.2d 300, 304 (4th Cir. 1978) (same), with, *e.g.*, *Dumas* v. *Mount Vernon*, 612 F.2d 974 (5th Cir. 1980) (suit must be filed within statutory time after employee should have perceived discrimination was occurring). We are unaware of any case in which a court has permitted an employee to rely on the current effect of a promotion policy which, although allegedly discriminatory, was terminated in a time-barred period. Such a complaint, we submit, would clearly be untenable under *Evans*. Moreover, we have serious doubts about the validity of any theory that would permit an employee, who does not sue in a representative capacity, to recover when the denial of promotion that affected him is wholly pre-Act or time barred, even if the discriminatory policy continues so as to affect other employees.

No such practical and conceptual difficulties attend the correction of unequal salaries which are the continuation of pre-Act, admittedly racially based pay differentials. Thus, just as an intentionally discriminatory seniority system, even one that was adopted before the Act became effective, is unlawful (*Pullman-Standard* v. *Swint*, 456 U.S. 273, 276-277 (1982); *American-Tobacco Co.* v. *Patterson*, 456 U.S. 63, 76 (1982)), so that it affords no justification for current employment practices that have a race-based effect, so the courts of appeals have correctly recognized that an intentionally discriminatory pre-Act salary system affords no justification for current salary practices that have a race-based effect. See pages 15-16, *supra*. To the extent that the court of appeals' justification of pay disparities as merely the "lingering effects" of pre-Act overt discrimination represents a willingness to tolerate such a practice, it cannot be allowed to stand.[20]

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[20] This Court's decision in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), on which petitioners in No. 85-93 rely (Pet. 27-28), is not strictly in point. That case arose under the Equal Pay Act, 29 U.S.C. 206, which specifically forbids the payment of lower wages to women than to men performing the same work. A violation of the Equal Pay Act is thus established simply by such a showing: the date when the disparity originated, and the reasons underlying the disparity, are largely irrelevant. In contrast, the plaintiff in this discriminatory treatment case under Title VII must establish not only the disparity in wages, but also the employer's intent to discriminate. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Thus we submit that a current disparity in salaries, without more, cannot be the basis for this Title VII claim of discriminatory treatment. Instead, it is necessary to examine the basis for that disparity to determine whether there has been actionable intentional discrimination subject to a timely challenge. Here, although the Service's decision to pay black employees less than whites for the same work was taken before Title VII became applicable to public employers, there is no dispute that the Service's compensation scheme was intentionally discriminatory.

2. We do not believe the other questions presented by the private petitioners merit review by this Court.

a. Private petitioners assert that the court of appeals required that a plaintiff's statistical evidence "consider[] every conceivable non-racial variable" (85-93 Pet. i, 35-44). We disagree with that reading of the opinion below. Instead, we believe that the court of appeals adopted the correct rule; any error in application of that rule to the facts of this case does not warrant review by this Court.

In our petition last Term in *Smith* v. *Segar*, cert. denied, No. 84-1200 (May 20, 1985), we argued that a rule of reasonableness must apply: To establish a prima facie case, plaintiff's statistics must take account of the neutral factors that normally would be expected to account for salary differentials. Once those variables have been included, if plaintiff's statistics still show a race-based disparity, the defendant must proffer an explanation in order to avoid the inference that the disparity results from illegal discrimination. Cf. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 368 (1977); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 580 (1978).

In essence, that is the rule the court of appeals adopted here. It faulted the Government's statistical analyses for omitting "variables which ought to be reasonably viewed as determinants of salary" (Pet. App. 391a). While the parties may disagree (as indeed we disagreed with the district court and court of appeals in seeking rehearing in this case) over how the variables should be treated in a particular

case, the variables on which the court below focused —job performance, prehire experience, and differences between the counties in salary levels—are, at least as a general matter, reasonable ones for consideration in an analysis of salary rates.[21] Moreover, the district court concluded that defendants had, by "evidence which the court found convincing" established a neutral explanation sufficient to rebut plaintiffs' statistics (Pet. App. 190a-191a). Thus we believe the court of appeals' general approach on this matter was correct and any disagreement we have is at a level of detail not meriting review by this Court.

b. The private petitioners contend that the court of appeals erred in finding the Service had not discriminated in its employment decisions relating to county chairmen (85-93 Pet. 49-55). The court of appeals concluded that the relevant "employment decisions" were completed when the Service made its recommendations for the county chairman position to the responsible county officials. It therefore analyzed those recommendations and concluded that they had not been discriminatory. In our petition for rehearing en banc we noted that the panel failed to recognize that the Service shared the responsibility for the selection of county chairman. This factual error does not warrant review by this Court. Petitioners, on the other hand, assert that the Service should nevertheless have been held vicariously liable for discriminatory actions by county officials. This is incorrect. Title VII requires that covered employers

[21] Although we pointed out in our petition for rehearing en banc (at 5 n.4) that the court of appeals erred in concluding that those variables were not adequately accounted for in the statistical analyses, that error in analyzing the particular evidence in this case does not warrant review by this Court.

not discriminate in their *own* employment practices; it does not make them "the guarantors of the workers' rights as against third parties who would infringe them." *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 396 (1982) (citing *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), a Title VII case).[22]

c. Private petitioners also ask this Court to review the conclusion of the court of appeals (Pet. App. 424a n.128) that "the mere existence of all white and all black 4-H and Extension Homemaker Clubs in some racially mixed communities violates neither Title VI nor the equal protection clause of the fourteenth amendment * * * [when] the record is totally devoid of any proof of discrimination with respect to services provided by any 4-H or Extension Homemaker Club." Petitioners assert (85-93 Pet. 44-49) that this conclusion is inconsistent with this Court's rejection of "freedom of choice" plans adopted by a school board in *Green* v. *School Board*, 391 U.S. 430 (1968). We do not believe that the principles applicable to compulsory public education are directly relevant to the voluntary organizations involved here, nor do we believe that the standards to be applied to such state-sponsored voluntary organizations merit review by this Court in a case in which the

[22] Contrary to the private petitioners' assertion (85-93 Pet. 53-54), *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), does not require a contrary result. The employer was liable in *Norris* because the challenged compensation benefits were only available to employees if they chose a benefit plan with an insurer selected by the state employer. Since the state only offered sexually discriminatory benefit plans, *it* had made the "employment decision" that was discriminatory in the provision of benefits. Here, if, as the court of appeals concluded, the *county* made the "employment decision" on selection, *Norris* is inapplicable.

court of appeals has found that the organizations have been conducted in an entirely race-neutral manner since Title VI was adopted, and that finding is not alleged to be clearly erroneous.

d. Finally, private petitioners allege (85-93 Pet. 55-58) that the denial of class certification here is inconsistent with *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). This issue does not affect the government's interests, and we accordingly express no view on whether petitioners' allegation is correct. We note, however, that private petitioners do not dispute the conclusion of the court of appeals that the government's intervention placed petitioners in the same position they would have been in had the class been certified (Pet. App. 366a-367a). Accordingly, the court of appeals correctly concluded that "in a practical sense at least, even if not in a technical one, the complaint on appeal on account of failure of class certification may seem to be of little moment or was made moot by the intervention of the government" (*ibid.*). A fortiori, that complaint does not warrant review by this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1985

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

December 10, 1984

TO: Cressie H. Thigpen, Jr., Esq.
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NOTICE OF JUDGMENT

Judgment was entered in Case No. 82-1873, 82-1881, 82-1927, 82-2065 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

A petition shall contain an introduction that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The page 15 limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original copy.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7

days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

JOHN M. GREACEN
Clerk

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OPPOSITION

BRIEF

85-428

No. 85-93

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION OF THE UNITED STATES

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QUESTION PRESENTED

1. Should this Court grant *certiorari* to review the fourth circuit's decision that there was no pattern or practice of intentional discrimination in the salary claims of Petitioners when the salary claims were correctly decided and no pattern or practice of intentional discrimination was found by the district court?

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IN THE

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P. E. BAZEMORE, *et al.*,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION OF THE UNITED STATES

STATEMENT OF THE CASE

This action was instituted in the U.S. District Court for the Eastern District of North Carolina on November 18, 1971, by more than fifty employees of the North Carolina Agricultural Extension Service (NCAES) alleging racial discrimination in employment and the provision of services by NCAES on behalf of 5 purported classes of blacks and indians. The United States intervened in the action on April 7, 1972, under Section 902 of Title IX and Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, 2000d and 2000d-1.

The United States was permitted to amend its complaint in intervention by Order of the Court on October 9, 1979, to include allegations of a pattern and practice of racial discrimination in alleged violation of Sections 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Class action certification was denied by the Court on October 9, 1979, after discovery closed.

On November 23, 1981, plaintiffs, amended their complaint to allege violations of Title VII. The defendants denied all allegations of discrimination. The nonbifurcated trial of this action began on December 7, 1981, and ended on February 12, 1982. Counsel for the United States and plaintiffs, acknowledged this was a disparate treatment case and that they had the burden of proving a policy, pattern and practice of intentional discrimination. (Tr. 10, 13, 16). The plaintiffs and the United States called over 46 witnesses to testify and introduced a multitude of exhibits in support of their pattern and practice and individual claims.

The defendants' case began on December 31, 1981 and the defendants called over 15 witnesses and introduced over 250 exhibits in support of their contention that no pattern or practice of discrimination existed and that the individual plaintiffs were not entitled to relief.

Both the United States and the private plaintiffs called rebuttal witnesses. (Tr. 6411-6616). The transcript consisted of 32 volumes and 6818 pages. Although there was some overlap of exhibits, the defendants introduced 274 exhibits, the plaintiffs 262 and the United States 274.

On August 20, 1982 and September 17, 1982, the Court entered Judgments and Orders dismissing all claims of both the United States and the individual plaintiffs.

In its decision of August 20, 1982, with respect to the pattern and practice claims, the Court found as follows:

(a) That this was not a proper action to be certified as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. (49a) This Finding was appealed.

(b) That blacks are not discriminated against in geographical employment assignments in NCAES. (53a) This Finding was not appealed.

(c) That NCAES does not discriminate in recruitment of black professional employees (55a) This Finding was not appealed.

(d) That NCAES does not discriminate in hiring black professionals at the county and state levels and NCAES's selection procedures are non-discriminatory. (62a) This Findings was not appealed.

(e) That NCAES does not discriminate in assignments of professional personnel to areas of responsibility (i.e. crops, livestock). (64a). This Finding was not appealed.

(f) That NCAES does not discriminate in title promotions of county level professional employees (from assistant to associate to full agent) and the performance evaluation system used in connection with promotions of county level professionals was valid, and non-discriminatory. (74a) This Finding was not appealed.

(g) That NCAES does not discriminate in the selection of county extension chairmen. (101a) This Finding was appealed.

(h) That NCAES does not discriminate in the selection of state level positions such as director, program leaders, specialists, and district chairmen. (106a) This Finding was not appealed.

(i) That NCAES does not discriminate with respect to terms, conditions and privileges of employment. (72a) This Finding was not appealed.

(j) That NCAES does not discriminate in connection with salaries. (150a) This Finding was appealed.

(k) That NCAES does not discriminate in work assignments. (152a). This Finding was not appealed.

(l) That NCAES has established valid, nondiscriminatory qualifications, tests, selection standards and procedures in hiring and promotion. (158a) This Finding was not appealed.

(m) That NCAES has taken appropriate action to correct the present effects of past racially discriminatory policies and practices. (163a). This Finding was not appealed.

(n) That NCAES provides equal services to minorities (164a). This Finding was not appealed.

(o) That NCAES' services to farmers and other persons are provided on non-racially segregated basis. (164a). This Finding was not appealed.

(p) That NCAES is not in violation of Title VI in the delivery of services to 4-H and Extension Homemaker Clubs. (185a). This Finding was appealed by Petitioners but not by the United States.

(q) That the case was a disparate treatment case, and NCAES did not engage in a pattern or practice of racial discrimination. (205a)

In its decision of September 17, 1982, the Court analyzed the individual claims of 42 plaintiffs and determined that none were entitled to relief.

The United States and private plaintiffs appealed to the fourth circuit. The United States appealed from only 3 of the 16 adverse rulings on their claims of alleged pattern or practice of discrimination. The private plaintiffs appealed from only 4 of the foregoing adverse rulings.

Decision was rendered by the court of appeals on December 10, 1984, affirming the district court's two judgments in all respects. Judge Phillips dissented on three claims, to wit: the 4-H Club claims; class action and salaries. He affirmed in all other respects. Petitions for Rehearing and rehearing *en banc* were denied by an evenly divided court on April 15, 1985.

On July 15, 1985, the private plaintiffs petitioned this Court for Writ of Certiorari to review the denial of the salary, county extension chairmen, 4H and Home Economics Clubs, and class action claims. NCAES filed a Brief in Opposition to private plaintiffs' petition, which Brief is referred to in respect to NCAES' position and grounds for opposition of all issues for which review is sought by private plaintiffs.

The United States obtained permission to extend its time in which to file a petition and response to private plaintiffs' petition until September 16, 1985. On September 16, 1985, the United States filed a Petition for Writ of Certiorari and Response to private plaintiffs' petition.

The United States sought review of only one issue related to the salary claims and responded to the other questions raised by private plaintiffs by stating it did not believe the remaining questions merit review by this Court. The one issue which the United States argues that this Court should review has been conceded by the United States to be a "rather narrow one." NCAES opposes the Petition for Writ of Certiorari filed by the United States.

SUMMARY OF ARGUMENT

The court of appeals correctly decided the salary claims in this disparate treatment case. The district court properly analyzed the salary claims by the allocation of proof set for pattern or practice and individual claims of racial discrimination through disparate treatment, which claims require proof of intentional discrimination, be they Title VII or 42 U.S.C. § 1981. The district court and court of appeals correctly followed *McDonnell-Doug-*

las v. Green, 411 U.S. 792 (1973); *Teamsters v. United States*, 431 U.S. 234 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *United Airlines v. Evans*, 431 U.S. 533 (1977) in requiring petitioners to prove their assertions of intentional discrimination. In each instance, petitioners failed to do so. The existence of intentional discrimination is for the trial court to decide. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's two decisions clearly show this was carefully decided on the facts and the facts showed no discriminatory intent.

The petitioner United States has elected to attempt to obtain review of an issue which it concedes is a rather narrow one and of diminishing importance. That issue is also one which the petitioners have created based upon an incorrect view of the facts and the decisions of the district court and the court of appeals. Petitioners claim that the decision permits the continued existence of discriminatory pre-1965 wage scales to justify post Act payment of lower salaries to blacks than similar situated white NCAES employees. This is incorrect and disregards the facts in this case.

Petitioners seek review by avoiding the facts and utilizing misdirected and specious assertions. Knowledge of the particular facts surrounding NCAES, its special requirements for hiring, staffing and the real non-discriminatory factors which clearly affect salary differences between all agents regardless of race is essential. NCAES employees, black or white, are not similarly situated.

Extension service employees in each of the 100 counties of North Carolina have factors affecting salary that are different from county to county and have nothing to do with race. Petitioners come here asserting the same old arguments which have failed them in the past. There are no "wage scales" involved and petitioners failed to

prove intentional discrimination in both pattern or practice and individual salary claims.

NCAES employees are professionals with college degrees required. Each of 100 counties has needs for different training and educational skills for NCAES agents and each county contributes different percentages of each agent's salary and percentages vary annually. NCAES pays the remaining percentage of an agent's salary. Salaries are not now, nor have they ever been, the same except for the minimum starting salary. From initial employment on, salaries of agents vary from county to county depending on performance, percentage of state versus county contribution and many other factors, none of which are racial.

The United States and private petitioners tried this case without regard to the facts surrounding the NCAES and are here trying once again to catch the Court's eye with an issue bearing no factual relationship to the NCAES salary and operational structure. This case is a disparate treatment case and petitioners failed to prove intentional discrimination.

At trial, petitioners submitted inaccurate comparisons and statistics which failed to utilize the proper factors affecting all agents' salaries. NCAES refuted and rebutted such evidence and showed it to be inaccurate and lacking in probative weight, which is permissible under standards set by this Court in *Dothard v. Rawlinson*, 433 U.S. 331 (1977) and *Teamsters*, *supra*. The district court and court of appeals properly rejected such evidence and improper statistics. Petitioners have nothing new or important to bring before this Court in connection with the salary claims or any other self-styled issue.

NCAES met the claims of petitioners and the United States head on in the trial of this case, responded to each claim, and showed an organization free from racial discrimination. Certiorari should be denied.

ARGUMENT

THE SALARY CLAIMS WERE CORRECTLY DECIDED AND CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THEM.

The Intentionally Discriminatory "wage scale" argument is specious

Petitioners argue that the decision holds that Title VII permits an employer to continue to pay similarly situated blacks less than similarly situated whites pursuant to intentionally discriminatory "wage scales" established prior to 1965 and that alleged resulting disparities constitute continuing violations of Title VII in conflict with other decisions of the fourth circuit. The opinion does not hold that at all and there is no evidence that NCAES ever established "intentionally discriminatory wage scales" prior to 1965 or at any other time. NCAES agents, whether black or white are not similarly situated.

Petitioners have made blatant assertions as to what the district court and fourth circuit held without providing the Court with the facts surrounding NCAES, its organization, structure, salary process and promotion practices. Knowledge of the NCAES, its organization, structure and salary process is essential to an analysis here. The district court's opinion is respectfully referred to for a detailed summary of NCAES, its function, salary process, programs, and employment processes. (6a-207a)

It is essential to understand from the outset that NCAES is not a factory assembly line endeavor, nor a corporation whose work force engages in similar tasks in similar work environments at plants and offices located within each of North Carolina's 100 Counties. Petitioners refer to the NCAES salary process as "wage scales" as if this case were a plant setting. Such is not the case.

The district court and the panel majority recognized that no "wage scale" situation exists and no meaningful

conclusions as to salaries can be drawn by petitioners comparing agents' salaries by title, race and tenure across county lines. Both courts correctly understood that such a comparison led to no valid conclusions at all under the facts of this case. North Carolina is divided geographically into 100 counties. Each county is a separate governmental agency with its own elected Board of Commissioners. NCAES and each county enter into a "Memorandum of Understanding" which is a separate written agreement and which, *inter alia*, governs the hiring of NCAES professional employees within the county and the amount of financial support that particular county will contribute towards the NCAES professional employees' salaries on a percentage basis. NCAES county level professional employees, i.e., agents, receive two checks each month. One is from the NCAES, funded by state and federal funds, and the other from the County. NCAES agents cannot be hired to fill a county agent position without County approval. The salary claims of petitioners focus on county level employees of NCAES. (20a-24a).

The specific needs of each of North Carolina's 100 counties determine the educational background and skills needed in the agents it employs. The minimum educational requirement is a bachelor's degree and skills within subject matter areas such as are needed by a particular county's extension program, to wit: Agriculture, 4-H, Home Economics or CRD. For instance, if a particular county has a large dairy farm population, its agricultural program needs would require an agent with a dairy or animal husbandry educational background or training skills. Thus each county has special needs. (58a-60a)

Why is this so? The answer is simple. North Carolina counties vary greatly in population, rural/urban population, size, racial makeup, topography, agrarian needs and resources. The climate and adaptability of the land

for crops, trees, poultry and livestock vary tremendously between counties located within the coastal plain, piedmont and mountain regions of the State. Black agents prior to the 1965 merger only functioned in 51 out of 100 counties and there are counties which have never had black extension agents due to the fact that few blacks reside there and blacks did not apply for extension positions there. (28a-29a, 48a, 192a-193a) No discrimination was found in NCAES assignment, recruitment or promotion of black NCAES employees.

Thus, the qualifications (educational background and skills) of the individual agents required to serve the needs of each county must differ and are in fact different as the record here reveals. (58a-59a) It is undisputed in this case that because of the wide variance among North Carolina's counties, the requirements for extension staff vary greatly from county to county and the needs of a particular county dictate the areas of subject matter responsibility, i.e., livestock, soybeans, etc., extension agents must possess within the particular county. Once an agent is hired to fill a county level professional position, he or she cannot be required to move or transfer by NCAES from one county to the other nor fill a position opening for which that agent is not qualified by education, training or interest to fill. (59a-61a) Each position carries its own special needs depending on the needs of the particular county. Where special qualifications are required to fill particular jobs, comparisons to groups who do not possess such special qualifications are of little probative value. *Hazelwood School District v. United States*, *supra*, 307-308. Just as the varying needs of each county governs its NCAES professional staff, the variance between each 100 counties in size, population, agriculture and wealth, governs each county's particular ability to financially support its Extension program within the county, including contributions to county agents' salaries. This has always been the case.

Because of this fact, some counties have an ability to pay more of an agent's salary than other out of their own funds and to pay their agents higher salaries. The remainder of each agent's salary comes from state and federal funds. The federal government allocates a sum of money to NCAES each fiscal year. Federal funds are combined with funds from the North Carolina general Assembly for NCAES to support salaries for county extension employees. The NCAES in consultation with the Board of County Commissioners determines what the state share of the agent's salary will be from the federal and state funds and what the county will pay that agent as its contribution. (20a) The percentage of salary paid by the county and NCAES varies greatly from county to county. These percentages change each year depending on the county's individual ability to pay and interest in the NCAES program within the county. In 1981 the percentage of salaries of local extension staffs that were paid by county funds ranged from a high of 57% in Forsyth County to a low of 18% in Camden County. (110a-113a).

Each county's extension staff is not staffed at the level of others. Each county staff is headed by the County Extension Chairman ("CEC") who is the highest paid NCAES county staff member in the county. The salary received by CEC's varied greatly between counties depending on the county's support. (DX 67-1-67-100) The minimum county staff is 2 and several counties have staffs exceeding ten agents in number. The agent determines whether or not to apply for each vacancy and applicants who do not have the skills and educational background required for the county vacancy are not considered. The district court found that the recruitment and hiring practices of the NCAES were valid and non-discriminatory. (58a-62a)

NCAES sets a minimum salary level for all new employees at the Assistant Agent Level with a bachelor's

degree and no prior experience. A salary differential is offered to those holding master's degrees. On occasions, due to "market demand" an agent has been employed above the entry level in order to obtain the skills in short supply. There have also been times when prior and relevant experiences justified a salary above minimum entry level. (109a) Since 1965, NCAES has set the minimum starting salary for all new county agents uniformly. (383a)

After initial employment, the agent or a County Chairman's salary may be affected at any given time by a great number of factors such as tenure, additional degress, subject matter area of specialty, area of responsibility, job performance and promotion from assistant agent to associate agent to full agent, ability of county to pay, state and county across the board raises, state and county merit increases, market competition for holders of certain educational degrees, and competition between counties for a certain agent's skills. (109a-116a, 133a-136a, 383a-385a) Contrary to petitioner's assertions, these variable factors are real, not imaginary and are supported by the record. (362a)

The position of County Extension Chairman was established in 1962 prior to the enactment of Title VI. (82a-83a) The County Extension Chairman is the top administrative position in each county. (74a, 82a) Petitioners tried to lump CEC salaries in their statistical salary comparisons of other agent's salaries. (136a-138a)

The panel majority noted the difference of the County Extension Chairman in salary and stated:

> "The district court correctly declined to compare or include the salaries of County Chairmen with those of agents. There is about a $4,000.00 average salary difference between chairmen and agent to begin with. The chairman is the head of the county based employees of the Extension Service. He is not routinely promoted from agent; the method of his selection is entirely different, and counting the salaries of the County Chairman together with those of the agents for purposes of analysis could only distort the result. (382a-383a)

The salary paid the chairman sets the *maximum extension salary* pay of any agent for that county. (DX 67-1-67-100, A. 632-633, 2210) Regardless of the starting salary, level, skill, performance or tenure, an agent's maximum will be *capped* by the salary paid to the chairman. There was one exception found in 1981, in Alamance County, where the salary of Ozetta Guye, a black HEA, exceeded that of the Chairman. (DX 67-86) As between County chairmen the salary ranges have always varied thereby directly impacting on the maximum amount of the agents' salaries within the counties. This accounts for differences among county agents' salaries and has nothing to do with race. Petitioners attempt to direct attention from this. The reason why can be plainly seen from the following facts.

In 1971, chairmen's salaries ranged from lows of $11,601 (Dare) and $11,621 (Avery) to highs of $16,588 (Wake) and $16,646 (Rockingham). In 1976 the range was from low of $16,028 (Dare) to high of $23,931 (Wayne). In 1981, CEC salaries ranged from lows of $20,000 (Stokes, Clay) to highs of $34,577 (Sampson) and $34,588 (Lenoir). (DX-196) As no one under the chairman receives a higher salary on the county level, this is proof positive that salaries vary from county to county because of this factor.

App. Exhibit A is a copy of DX-196. This Exhibit shows the percentages of county contribution to the NCAES program for all 100 counties in 1971/72 together with the salaries of all 100 CEC's for the years 1971, 1976 and 1981. This clearly shows the variances in salaries between counties. As the CEC's salary is the cap, the variances of salaries between agents from one

county to the next vary as well. It further proves there are no uniform wage scales and NCAES agents are not similarly situated.

The salary process is non-discriminatory

The salary process of NCAES conducted annually involves pay raises of only three kinds. The panel majority grasped this fact and stated:

> "At the outset of this part of the discussion, certain matters admitted or found by the district court and not appealed are important to remember. There is no discrimination in hiring. There has been no discrimination in promotion from assistant to associate to full agent. Pay raises of three kinds from whatever source, percentage raises, across the board raises, and merit raises. There is no discrimination in across the board and percentage raises. Everyone gets them . . . ." (Id. p. 25, 26) The merit salary process was determined to be nondiscriminatory. (383a)

Another factor which explains differences in salaries is that the percentage of total salary paid by each county varies from county to county. Percentages ranged from 18% to 57% in 1981. This factor alone causes differences from entry level on with respect to across the board and percentage raises, from state/federal and county funds, regardless of source and from year to year. Race has nothing to do with percentage contributions. (383a)

For example. Two agents both started at $15,000.00 entry level in 1981, and both agents were employed as agricultural agents with agronomy backgrounds. Each was employed to fill a vacancy in a different county. In 1982, the State of North Carolina provided a 5% cost of living increase. The effect would be as follows:

1. Agent A was employed by a county paying 30% of his salary. Thus Agent A's salary was 70% state/federal funds and thus 70% was subject to the 5% cost of living

increase. Agent A would receive 5% of 10,500 (70% of 15,000) as an across the board raise. Thus if A received no other raise, A's raise would be $525.00 (5% of 10,500).

2. Agent B was employed by a county paying 57% of his salary. Thus Agent B's salary was 43% state/federal funds and thus 43% was subject to the 5% cost of living increase. Agent B would receive 5% of $6,450 (43% of 15,000) as an across the board raise. Thus if B received no other raise, B's raise would be $322.50 (5% of 6,456), a difference in across the board raise in annual salary for 1982. No other raises considered, A would receive in excess of over $200.00 per year simply as a result of the county percentage factor.

The record shows that every year some counties grant across the board increases in salary and some do not. NCAES does not utilize the funds allocated by the state/federal increases and take state salary money from those counties who support the program to fund county portions of raises in those counties who do not support the program with across the board raises. This factor causes a variance each year. (110a-111a, 135a, 383a) All one has to do is apply a county percentage across the board raise to A and B of different percentages and the margin in salary could be reduced or widened considerably. Such a factor is not created by imagination or ingenuity of counsel.

Tenure, educational level (i.e., masters or doctorate), size of program and area of skill are factors in an agent's salary, including having a skill which is particularly needed. (109a) Also inflation is a factor which cannot be overlooked in salary analysis. The cost of entrance level hiring has gone up and salaries have to be adjusted upward to keep abreast of starting salaries for assistant, associate and full agent, none of which have anything to do with race and are uniformly set. (115a)

These factors are real and non-discriminatory and are applied annually. The United States acknowledges that they are reasonable factors for consideration in salary analysis. (Pet. p. 20)

The merit salary process involves the one area of NCAES pay increase (excluding county merit) which is not across the Board. A discussion of the merit process is contained in the district court's opinion. (113a-116a). This process was found to be non-discriminatory and based upon a valid performance evaluation system. (154a-158a)

The Decision is not in conflict with other Courts of Appeals

Disregarding the foregoing facts about NCAES, its salary structure and process, Petitioners assert this decision with respect to salary is in conflict with other Courts of Appeals to the effect that Pre-Act, intentional discrimination cannot be used to justify Post-Act payment of lower salaries to blacks than to similarly situated white employees. This argument is specious on the facts of this case.

It is readily apparent that NCAES employees, both black and white are not similarly situated because of the varying real and differing factors affecting each one's salary and job requirements. The fact that CEC salaries in the 100 counties varied by as much as $4,900.00 in 1971 and by as much as $14,000.00 in 1981 clearly shows that NCAES employees, white and black have never been similarly situated and that no wage scales existed. This case is not in conflict with decisions of other Courts of Appeals cited by the United States.

Petitioners argue that this case should be reviewed and remanded in the face of the facts on this record which clearly refute their specious wage scale assertions so the "presently unclear" effects of the so-called "discriminatory wage scales" can be determined. This limp

assertion is diluted by the United States admission that it recognizes its own issue to be a "narrow one" and that what it asserts as a "lingering effect" of the pre-1965 NCAES system is buried in a complex matrix of post-Act salary decisions such that the so-called discriminatory effect is presently "unclear."

What Petitioners avoid is the fact that this is a disparate treatment case and that they failed to prove intentional discrimination at trial. The requirement of intentional discrimination as part of the United States' burden of proof is acknowledged by it in its petition. (Pet. p. 18) Petitioner also acknowledges that the plaintiff had to establish not only a disparity in average wages but also NCAES intent to discriminate in connection with salaries. (Pet. p. 18) This critical element it failed to prove at trial.

The district court determined the case to be one of disparate treatment under *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) requiring proof of intentional discrimination in Title VII claims of disparate treatment. In a disparate treatment case proof of discriminatory motive is critical. *Teamsters v. United States, supra*, 335.

The allocation and burden of proof in a Title VII disparate treatment pattern or practice case is governed by *Teamsters, supra*. It is important to note the district court's discussion of the pattern or practice claim:

> "A careful weighing and assessing of the plaintiffs' statistical and non-statistical evidence led the court to conclude that the plaintiffs had probably made out a prima facie case with respect to defendants' promotion and salary practices, and the analysis proceeded on this assumption. While not conceding that plaintiffs had made a prima facie case, the defendant Extension Service assumed the burden of articulating plausible reasons for its actions, and its evidence, which the court found convincing, has been set forth herein. When the plaintiffs failed to produce evidence to establish that defendant's reasons

were pretextual plaintiff's case failed. *EEOC v. Korn Industries, Inc.*, 682 F.2d 256, 262 (4th Cir. 1981). (181a-191a)

It is clear Title VII disparate treatment and 42 U.S.C. 1981 claims both require proof of intentional discrimination. *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982). The district court found there was no intentional discrimination and that the reasons offered by NCAES were valid and plausible and not rebutted. (104a) The existence of intentional discrimination is for the trial court to decide. *Pullman v. Swint, supra*. The district court made no finding that NCAES established or maintained intentionally discriminatory wage scales.

Title VII became applicable to public employers in 1972. *Hazelwood School District v. United States, supra*, decided after *United Airlines v. Evans*, clearly held that a public employer (NCAES) who from that date forward (March, 1972) made all its employment decisions in a wholly non-discriminatory way did not violated Title VII even if it had maintained an all-white work force by purposefully excluding Negroes. Petitioners' argument is fraught with misleading statements. Assertions that the majority opinion holds that "North Carolina is free to pay blacks hired prior to 1965 less than whites for the rest of their lives" and to pay blacks based on "racially motivated pay schedules established in the past" are evidence of such distortions. The district court stated:

> "The court has been impressed by the absence in this case of so many of the usual badges of discrimination. For instance there was no evidence—that there is any difference in the entry level salaries of blacks and whites." (199a-200a)

Petitioners also ignore the fact that the district court carefully viewed the individual plaintiff's salary evidence and stated:

> "The Court has therefore carefully reviewed plaintiffs' evidence showing individual salary comparisons and as a result has concluded that while that smile on its face and evidence unquestionably establishes salary disparities, when viewed in light of defendants' explanatory evidence it fails to prove discrimination." (122a-123a)

The district court was properly applying the *Teamsters* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) standards of proof when the district court analyzed individual plaintiffs' salary and promotion claims and considered them in determining the pattern or practice case. *Hazelwood* marked the point in time in which analysis of employment decisions by a public employer for purposes of violations of Title VII would start. An analysis by both the district court and the panel majority, as set forth in their opinions, clearly showed NCAE's employment decisions, including administration of salary, to be made in a wholly non-discriminatory way. The lack of proof of intentional wage discrimination coupled with the non-discriminatory salary process supports the decision that NCAES did not violate and was not violating Title VII in 1972 or to the present. Couple this with the findings, not appealed, that there was no discrimination in hiring, promotion, assignments, education opportunities, training or services and it is clear that the plaintiffs' distortion of the facts to attempt to lead the Court to believe that the NCAES salary process involved standardized "wage scales" at any time is specious. *Hazelwood* and *Evans* were properly followed here.

It is patently clear that petitioners' assertions are without merit and that the district court and court of appeals correctly decided the case on the evidence. No review is mandated here.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted, this 17th day of October, 1985.

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APPENDIX

APPENDIX

EXHIBIT A

DX-196 1971-72% of County Contribution

SOUTHWESTERN	71/72%	1981	1976	1971
Alexander	40.72	25,089	16,730	14,263
Anson	31.08	21,000	18,080	13,474
Burke	47.86	27,152	18,303	14,040
Cabarrus	45.22	26,814	18,319	13,862
Caldwell	46.82	27,884	18,686	13,412
Catawba	41.27	28,788	18,537	14,619
Cleveland	36.87	27,204	18,801	13,600
Gaston	43.09	29,551	18,942	14,416
Iredell	39.12	30,901	20,574	14,308
Lincoln	41.36	26,391	16,754	15,399
Mecklenburg	52.42	29,500	19,150	13,975
Montgomery	36.56	26,000	18,471	12,742
Moore	48.50	24,185	17,610	12,752
Richmond	30.74	25,882	17,571	13,349
Rowan	39.25	27,871	21,622	15,976
Stanly	42.53	23,721	17,211	16,030
Union	36.65	31,004	17,500	14,760
TOTALS				
NORTH CENTRAL				
Chatham	35.95	28,116	18,940	13,910
Durham	39.60	27,015	18,375	13,375
Edgecombe	43.42	27,843	18,648	13,710
Franklin	27.69	24,842	17,023	13,106
Granville	38.22	30,402	Vacant	12,827
Halifax	42.73	31,177	19,159	14,596
Harnett	43.13	26,480	16,796	12,500
Johnston	44.20	33,765	21,217	15,145
Lee	35.93	21,584	17,680	13,008
Nash	40.56	25,990	17,135	12,936
Northampton	31.40	33,915	17,136	16,208
Orange	40.94	27,193	18,033	13,940
Person	27.85	26,045	18,480	13,206
Vance	37.01	22,740	18,325	13,466
Wake	44.30	29,458	21,800	16,588
Warren	29.73	24,244	17,730	13,490
Wilson	44.25	30,656	20,632	15,984
TOTALS				

DX 196(2) 1971-72% of County Contribution

WESTERN	71/72%	1981	1976	1971
Avery	8.27	22,500	17,800	11,621
Buncombe	33.18	32,681	21,595	14,806
Cherokee	26.26	26,141	17,784	12,314
Clay	12.11	20,000	17,350	12,421
Graham	31.45	25,581	16,500	12,918
Haywood	29.53	27,968	18,028	14,350
Henderson	34.00	29,561	18,203	13,301
Jackson	40.32	Vacant	19,350	13,170
Macon	30.25	29,459	18,400	12,806
Madison	18.21	27,546	18,300	12,596
McDowell	35.11	21,459	17,229	13,088
Mitchell	14.29	22,630	18,200	13,146
Polk	36.71	23,134	17,955	12,960
Rutherford	44.51	27,300	19,114	13,878
Swain	18.90	21,725	17,678	13,230
Transylvania	40.02	25,581	17,424	11,670
Yancey	18.76	25,323	17,350	12,043
TOTALS				
NORTHWESTERN				
Alamance	45.37	24,861	17,634	15,386
Alleghany	23.72	22,718	17,180	12,500
Ashe	26.94	21,052	16,276	12,198
Caswell	29.91	21,156	16,453	12,554
Davidson	45.33	29,067	19,328	15,474
Davie	30.13	29,492	18,283	13,575
Forsyth	53.46	30,155	22,243	16,230
Guilford	47.41	32,120	21,364	16,392
Randolph	46.42	31,384	17,655	12,924
Rockingham	50.68	27,592	21,860	16,646
Stokes	35.54	20,500	17,065	13,450
Surry	42.36	27,000	18,741	14,590
Watauga	26.38	24,762	16,993	13,728
Wilkes	39.44	26,530	18,977	14,667
Yadkin	30.59	27,270	16,646	13,388
TOTALS				

DX 196(3) 1971-72% of County Contribution

NORTHEASTERN	71/72%	1981	1976	1971
Beaufort	31.68	27,254	17,139	12,838
Bertie	23.96	25,275	16,484	13,001
Camden	15.96	25,285	16,356	11,726
Chowan	16.97	23,500	29,465	14,811
Craven	50.20	26,291	17,097	13,079
Currituck	28.40	26,292	18,337	12,868
Dare	22.12	23,260	16,028	11,601
Gates	18.16	29,564	19,209	12,355
Hertford	24.53	28,381	17,194	13,264
Hyde	18.85	28,490	18,284	12,682
Martin	40.58	29,426	18,805	13,143
Pamlico	20.82	23,000	18,189	13,243
Pasquotank	29.44	31,506	17,998	13,054
Perquimans	18.63	21,807	16,383	12,828
Pitt	43.32	27,556	19,848	14,581
Tyrrell	14.77	26,939	17,284	12,500
Washington	21.36	29,488	12,582	12,899
TOTALS				
SOUTHEASTERN				
Bladen	32.02	25,536	19,678	13,661
Brunswick	32.35	25,513	16,900	13,280
Carteret	37.56	27,655	17,806	13,227
Columbus	32.21	27,766	16,968	13,913
Cumberland	47.77	37,044	18,934	14,223
Duplin	30.85	26,878	18,615	14,156
Greene	30.31	26,860	18,000	12,792
Hoke	32.63	22,008	17,674	13,618
Jones	19.71	28,183	18,470	13,080
Lenoir	35.37	34,558	23,931	12,582
New Hanover	38.83	28,898	20,024	14,702
Onslow	39.19	24,782	17,422	12,524
Pender	27.57	25,295	16,871	12,252
Robeson	40.50	28,250	19,302	14,970
Sampson	37.27	34,577	19,490	13,862
Scotland	43.45	25,764	16,756	12,914
Wayne	44.14	28,962	21,532	16,278
TOTAL				

REPLY

BRIEF

Supreme Court, U.S.
FILED
OCT 30
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-428

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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REPLY MEMORANDUM FOR THE PETITIONERS

Respondents focus on the North Carolina Agricultural Extension Service's recent salary practices and, in so doing, completely ignore the thrust of the Government's petition. The United States does not here seek review of the determination below that the Service's salary scheme for county agents hired *since* 1965 does not discriminate against black agents. Rather, our petition seeks review of the court of appeals' ruling that Title VII provides no remedy for the Service's post-Act failure to eliminate disparities in salaries between black and white agents hired *before* 1965, even though there is no dispute that those disparities had their origin in racial discrimination. Respondents' extensive factual discussion of the Service's salary scheme for post-1965 hires has no bearing on this question of law.[1]

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[1]We therefore do not address the factual accuracy of that discussion.

As we indicated in our petition (at 3 & n.2), it is undisputed that the Service was divided into a "white branch" and a "Negro branch" until the two branches were merged in August 1965; that black agents in the segregated system were paid lower salaries than their white counterparts; that these disparities were not immediately eliminated after the merger was accomplished; and that the disparities continued after Title VII became applicable to the Service and other public employers in March 1972. Both lower courts acknowledged these facts (see Pet. App. 27a, 30a-31a, 120a-121a, 359a-360a).[2] Although respondents now argue that "there is no evidence that [the Service] ever established 'intentionally discriminatory wage scales' prior to 1965 or at any other time" (Br. in Opp. 8), the record includes a 1971 memorandum by a former director of the Service (then an assistant director) attributing salary differentials of $800-$1100 between black and white agents largely to "tradition" and the existence of "less county support for non-white positions" (see Pet. App. 439a-440a). Moreover, as the court of appeals explicitly noted, the Service "admit[ted] that, while it had made some adjustments to try to get rid of the salary disparity resulting on account of pre-Act discrimination, it has not made all the adjustments necessary to get rid of all of such disparity" (Pet. App. 389a-390a).

The court of appeals concluded that, as a matter of law, the Service has no obligation under Title VII to eliminate post-Act salary differentials attributable to pre-Act racial discrimination (Pet. App. 380a-382a). It is this conclusion of law, and not any factual finding or legal conclusion concerning other aspects of the Service's post-Act salary scheme, that is challenged in our petition. Accordingly, the

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[2]References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by the private plaintiffs in *Bazemore* v. *Friday*, No. 85-93, seeking review of the same court of appeals decision.

position asserted by respondents in their brief in opposition—that the court of appeals correctly ruled that there has been no intentional racial discrimination in the Service's other post-Act salary practices—does not support denial of the writ of certiorari sought here.

For the foregoing reasons and the reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1985

DOJ-1985-10

REPLY

BRIEF

(5) (5)

Nos. 85-93, 85-428

Supreme Court, U.S.
FILED
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ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners,

v.

WILLIAM C. FRIDAY, et al.

On Petitions for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS BAZEMORE, ET AL.

Petitioners P. E. Bazemore, et al., submit this reply brief in response to the petition for writ of certiorari filed by the United States:

(1) Ten months ago the Solicitor General advised this Court that the conflicting views of the circuit courts regarding the use of statistical evidence was an important problem warranting review by this Court. Petition for Writ of Certiorari, Smith v. Segar, No. 84-1200. The Solicitor argued in Smith that the District of Columbia's method of evaluating statistical evidence involved "a significantly different approach in evaluating multiple regression analysis" than the Fourth Circuit decision in the instant case. (Id., 23). The Solicitor asserted the conflicting Fourth Circuit and District of Columbia Circuit practices were both unsound, characterizing the latter as a violation of standards established by several decisions of this Court.[1]

[1] The Solicitor argued that the decision in Smith was in conflict with Mayor of Philadelphia v. Educational Equity League,

In his January 1985 petition in Smith the Solicitor read the Fourth Circuit opinion in this case, as do we, to require a plaintiff to include in any statistical analysis any variable that could possibly explain away racial disparities. In Bazemore, the Solicitor argued, there were

> nine independent variables that the court [of appeals] believed should have been but w[ere] not included in the multiple regression analysis included in that case.... We believe that the Bazemore court went too far...; our position is not that plaintiffs' multiple regression analysis must include any qualification that the employer at some point in the litigation asserts as necessary for the position at issue. (Petition, pp. 24-25).

415 U.S. 605 (1974), Connecticut v. Teal, 457 U.S. 440 (1982), and City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978). Petition, pp. 22-23.

The Solicitor argued in Smith that a wage comparison of blacks and whites in the same job need not consider any other factors unless the employer utilized some clearly established standard to set different salaries for employees doing the same work.

In the instant case the Solicitor appears to embrace the fourth circuit doctrine he earlier repudiated, now asserting that a wage comparison of blacks and whites in the same job is of no evidentiary significance unless that analysis includes all "factors that normally would be expected to account for salary differentials." (Petition, p. 9). Like the court below, the Solicitor sees no need for a defendant to offer any evidence that these factors were actually utilized in setting salaries, or to demonstrate that including those variables would actually affect proven disparities

in the salaries of blacks and whites. On this view, a court should reject statistical evidence whenever that court, or an employer, can hypothesize any "reasonable" factor that might have affected the salaries in dispute. (Id, 19-20). The Solicitor in January of this year regarded that doctrine as both incorrect and in conflict with other appellate decisions, and we concur with his original view of the matter.

(2) The Solicitor urges that the fourth circuit was correct in holding that Title VII permits an employer to avoid legal responsibility for employment decisions by delegating those decisions to a third party. (Petition 20-21). The Solicitor does not dispute the obvious importance of this issue, but insists that this Court resolved that very question in General Building Contractors Ass'n. v. Pennsylvania, 458 U.S. 375 (1982).

General Building Contractors, of course, was a section 1981 case, and the decision there turned on the fact that section 1981, unlike Title VII, requires proof of discriminatory intent.

The Solicitor asserts General Building Contractors is also a definitive interpretation of Title VII because that decision cited a Title VII case, Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978). The passage from Furnco referred to in General Building Contractors, however, has nothing to do with whether an employer can delegate away its Title VII obligations.[2] The signal preceding the citation to Furnco is "Cf.", which indicates that the cited material

[2] "Title VII ... does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." 438 U.S. at 577-78.

does not contain the same holding as the General Building Contractors opinion in which it was cited.[3]

(3) The applicable regulations of the United States Department of Agriculture require a state such as North Carolina which established its 4-H club system on a de jure segregated basis to "take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. § 15.3(b)(6)(i). There is no dispute that respondents have never taken, and do not intend to take, such action, and thus remain in violation of that regulation. The Solicitor General, as attorney for the Secretary of Agriculture, evidently has no interest in enforcing the Department's regulations. We do, and the

[3] Cf. indicates that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means 'compare'." A Uniform System of Citation, 9 (13th ed. 1981).

parties to enforce such Title VI regulations was clearly established by Guardians Association v. Civil Service Commission, ____ U.S. ____, 77 L.Ed.2d 866, 103 S.Ct. 3221 (1983).

(4) The Solicitor suggests that it does not matter whether the denial of class certification was erroneous, since the government intervened in 1972 seeking the same relief requested in the private class action. (Petition, p. 22). Elsewhere in his petition, however, the Solicitor abandons the salary claims of all black employees hired after 1965 (id., pp. 19-20), the promotion claims of all black employees denied positions as county chairmen (id., pp. 20-21), and the claims of black employees who object to serving racially segregated 4-H and Extension Homemaker Clubs. (Id., pp. 21-22). The certification issue may have seemed of little practical importance while the

Department of Justice was still championing each of these claims, but the Solicitor's decision to abandon those claims makes the availabiiity of certification of vital importance. If the Court grants certiorari on questions 2, 3, or 4, it should grant certiorari on question 5 as well, in order to assure that the interests of putative class members will continue to be fully represented and enforced.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the fourth circuit.

Respectfully submitted,

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JOINT

APPENDIX

Supreme Court, U.S.
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Nos. 85-93 and 85-428

In the Supreme Court of the United States

OCTOBER TERM, 1985

P.E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI IN NO. 85-93 FILED JULY 15, 1985

PETITION FOR A WRIT OF CERTIORARI IN NO. 85-428 FILED SEPTEMBER 12, 1985

CERTIORARI GRANTED NOVEMBER 12, 1985

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-93

P.E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

No. 85-428

UNITED STATES OF AMERICA, ET AL., PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1873

P.E. BAZEMORE, ET AL., PLAINTIFFS-APPELLANTS,

v.

WILLIAM C. FRIDAY, ET AL., DEFENDANTS-APPELLEES

APPEAL FROM THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

DATE	FILINGS—PROCEEDINGS
10/05/82	Case docketed. Awaiting ROA. tcb.
10/08/82	ORDER cons. cases 82-1873 and 82-1881 for briefing and oral argument, filed. tcb
10/14/82	DISCLOSURE STMNT, Es, N, filed. tcb
10/14/82	DISCLOSURE STMNT, Es, N, filed. tcb (case 82-1881)
10/19/82	DISCLOSURE STMNT, As, N, filed. tcb
10/21/82	DISCLOSURE STMNT, As, N, filed. tcb
10/21/82	DISCLOSURE STMNT, As, N, (82-1881), filed. tcb
10/26/82	ORDER cons. case 82-1927 with 82-1873(L) and 82-1881 for briefing and oral argument, filed. tcb
11/01/82	DISCLOSURE STMNT, Es (82-1927), N, filed. tcb
11/02/82	DISCLOSURE STMNT, Es (82-1927), N, filed. tcb
11/05/82	MOTION (K-53) of As for leave to file separate briefs and lead counsel, filed (SAR:jeh)
11/15/82	RESPONSE/Es to motion K-53, filed. (SAR:fls)

11/23/82 ORDER granting motion of As for leave to file separate brfs. and lead counsel, and establishing brf. schedule: As due: 1/03/83, filed. (SAR:fls)

11/30/82 ORDER cons. case 82-2065 with 82-1873(L), 82-1881 and 82-1927 for briefing and oral argument, filed. Briefing order of 11/23/82 to be adhered to. tcb.

12/6/82 MOTION (L-65) of USA for leave to defer filing the appendix pursuant to Rule 30(c), FRAP, filed (CRL:jeh) MOTION DENIED

12/10/82 RESPONSE of Es to motion L-65, filed (CRL:jeh)

12/13/82 MOTION (L-66) of As-P. E. Bazemore, et al, for extension of time to file brf, filed (CRL:jeh) MOTION DENIED

12/16/82 MOTION (L-113) of government for extension of time to file brf., filed. MOTION DENIED. (CRL:fls)

12/21/82 MOTION (L-145) of A USA, for reconsideration of denial of procedural motions, filed. (CRL:fls)

12/22/82 RESPONSE/Es to motion L-145, filed. (CRL:fls)

12/28/82 ORDER granting motion for reconsideration (L-145) of denial of procedural motions and granting extension of time to file As' brfs. and appx. to 1/17/83, filed. (CRL:fls) Copy to Thigpen; Reibman; Craige-Reynolds-Barnett-Marblestone; Manning-Manning; Rich., Greenberg-Schnapper. (Mo. re deferred appx. denied – plm)

12/23/82 MOTION (L-193) of private plaintiffs-As for reconsideration of denial of procedural question, filed. (CRL:fls) (See order L-145)

12/23/82 DISCLOSURE STMNT, Es, (82-2065), N, filed 12/06/82. tcb

12/23/82 DISCLOSURE STMNT, Es, (82-2065), N, filed 12/07/82. tcb

01/03/83 DESIGNATION-Es, parts to be included in joint appendix, filed. tcb

01/20/83 MOTION of Ps-As P. E. Bazemore for leave to file brief in excess of 50 pages (A-152), filed (PLM:bel)

1/21/83 Supplemental motion of As (A-152), filed (PLM:jeh)

1/26/83 ORDER granting motion of As to file brief in excess of 50 pages, not to exceed 65 pages, filed (PLM:jeh) Copy to Reibman; Manning; Rich; Craige-Reynolds-Barnett-Marblestone; Thigpen

1/31/83 MOTION (B-18) of Es' for extension of time to file brief and motion for leave to file brief in excess of 50 pages, filed (PLM:bel) Submitted to HEW*, FDM on 2-14-83.

2/22/83 ORDER granting Es' motion for extension of time to March 7, 1983 to file brief and for leave to file brief not in excess of 95 pages, filed. (PLM:bel) Copy to: Reibman; Manning; Rich; Craige-Reynolds-Barnett-Marblestone; Thigpen; Greenberg-Schnapper-Sherwood;

3/7/83 MOTION (C-90) of As for additional time within which to file reply brief, filed (BMM:jeh)

3/16/83 ORDER granting As an additional 7 days to file reply brief, filed (BMM:jeh) Copy to Thigpen; Reibman; Craige-Reynolds-Barnett-Marblestone; Manning-Manning; Rich; Greenberg-Schnapper-Sherwood

12/19/84 E's bill of costs, filed. dhp

12/26/84 A's petition for rehearing and suggestion for rehearing en banc filed. Transmission of petition for rehearing held pending decision of US motion to extend time to file rehearing also. dhb

12/26/84 MOTION of United States (L-160) for ext. of time to 1/7/85 to file pet. for rehearing and suggestion for reh. in banc, filed. jd

1/3/85 ORDER granting motion L-160. (BMM:jd) Copy to counsel.

1/2/85 PETITION FOR REHEARING (A-13) and suggestion for rehearing in banc of As, filed (DHB:jm)

1/7/85 Petitions filed 12/26/84 and 1/2/85 transmitted to HEW, JDP, Judge Kellam w/copy to all circuit judges (DHB:jm)

2/4/85 MOTION of Es (B-13) for an ext. of time to 2/14/85 to file answer to pet. for rehearing, filed. jd

2/6/85 ORDER granting motion B-13. (BMM:jd) Copy to counsel.

2/14/85 RESPONSE (A-13 & L-161) of Es to both petitions for rehearing and suggestions for rehearing in banc, filed (DB:cw) Transmitted to HEW, JDP, RBK on 2-15-85.

4/15/85 ORDER denying pet. for reh. and sug. for reh. in banc in these appeals, filed (BMM:nac) Copy to counsel on 4/16/85.

4/22/85 Bill of costs taxed. Copies to Thigpen, Reibman, Rich, Manning/Manning, Marblestone, et al., Greenberg, et al. lgs

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

NO. 2978 CIVIL

RALEIGH DIVISION

P.E. BAZEMORE, ET AL., PLAINTIFFS

v.

WILLIAM C. FRIDAY, ET AL., DEFENDANTS

DATE	NR	PROCEEDINGS
11/18/71	1	Filed & Ent. PETITION FOR JUDGMENT DECLARING, PERMANENT INJUNCTION, RESTRAINING DEFENDANTS FROM DISCRIMINATING POLICIES AND PRACTICES IN EMPLOYMENT – Allege all defendants are bi-racial and are discriminating against all classes, seek any further relief and grant costs and attorney fee to plaintiffs.
		Filed & Ent. COST BOND – $200.00 cost bond, Surety, US Fidelity Co.
		Issued Summons, Original and 12 copies to USM for service, w/12 copies petition.

11/29/71		Filed & Ent. US MARSHAL RETURN—Served Adm. Lear by cert. mail 11/22/71.
		Filed & Ent. US MARSHAL RETURN—Served Chancellor Caldwell Univ. N. C. 11/23/71.
		Filed & Ent. US MARSHAL RETURN—Served Director Hyatt, Jr. N. C. Agric. 11/22/71.
		Filed & Ent. US MARSHAL RETURN—Served Board Trustees UNC 11/22/71.
		Filed & Ent. US MARSHAL RETURN—Served Charles L. Becton 11/22/71.
		Filed & Ent. US MARSHAL RETURN—Served C. Hardin, Sec. Agric. 11/22/71.
		Filed & Ent. US MARSHAL RETURN—Served C. Amick, Alamance CC. 11/19/71.
		Filed & Ent. US MARSHAL RETURN—Served C. Hardin, Sec. Agric. by mail 11/29/71.
		Filed & Ent. US MARSHAL RETURN—Served UNC Chapel Hill 11/19/71.
12/2/71		Filed & Ent. US MARSHAL RETURN—Served Meckleng CC 11/29/71.
12/7/71	2	Filed & Ent. US MARSHAL RETURN—Served Edgecombe CC 11/26/71.
1/7/72	3	Filed & Ent. ANSWER—All State and County officials designated in complaint fully answers the

		complaint, denies all charges, ask plaintiff's recover nothing and cost of action be taxed against plaintiffs. w/copy and cert. service.
1/17/72	4*	Filed & ent. ORDER that defts. are allowed until & including 2/22/72 within which to file answer or other pleading in action. (DUPREE, J.) (Civ. O.B.#23,P.7253) 1 cy to U.S.A.
2/17/72	5	Filed & ent. ORDER allowing defts. to & including 3/23/72 within which to file answer or other pleading in action. (DUPREE, J.) (Civ.O.B.#23, P.7331) 2 CC to U.S.A.
3/22/72	6	Filed & ent. CONSENT ORDER allowing defts. to & including Apr. 7, 1972 within which to file answer or other pleading. (DUPREE, J.) (Civ.O.B.#23, P.7409)
4/7/72	7	Filed & ent. MOTION TO DISMISS FEDERAL DEFENDANTS AND TO AMEND COMPLAINT w/Cert. of Ser.
	8	Filed & ent. MOTION TO INTERVENE AS PLAINTIFF by U.S.A. 4 cc to U.S.A.
	9	Filed & ent. MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE w/Cert. of Ser. 4 cc to U.S.A.

	10	Filed & ent. ORDER that U.S.A. is allowed to file a Complaint in Intervention. (DUPREE, J.) (Civ.O.B.#24, P.7463) 4 cc to U.S.A.
	11	Filed & ent. COMPLAINT IN INTERVENTION by U.S.A. praying for order enjoining defts. from failing to provide services to minorities equal to those they provide white persons; maintaining racially segregated 4-H clubs & extension homemaker clubs; providing services to 4-H clubs, extension homemaker clubs, farmers & other persons on racially segregated basis; from discriminating in favor of white persons & against minorities in hiring & promotion & in terms & conditions of employment in extension service jobs & for costs & disbursements of action.
	12	Filed & ent. CERTIFICATE OF THE ATTORNEY GENERAL OF THE UNITED STATES
4/21/72	13	Filed & ent. THIRD-PARTY COMPLAINT by William C. Friday, Pres. of Consolidated Univ. of N.C., et al. Issued Summons w/Third-Party Complaint to U.S. Marshal for service: Orig. & 8 cc to U.S.M.

4/28/72	14	Filed & ent. ORIGINAL ANSWER TO COMPLAINT IN INTERVENTION by defts., being all those State & County officials designated in Complaint in Intervention, answering Complaint of plff-intervenor, U.S.A.-praying that plff.-interv., U.S.A., have & recover nothing of defts. & that action be dismissed & costs taxed against plff.-interv. w/Cert. of Ser.
	15	Filed & ent. AMENDMENT TO THIRD-PARTY COMPLAINT, w/Cert. of Ser.
2/7/72	4-A	Filed & ent. INTERROGATORIES TO DEFTS. PROPOUNDED BY PLFF. w/CS
4/28/72		Fil. & ent. U. S. MARSHAL'S RETURN on 3rd-Party Complaint: Earl L. Butz, Sect. of Agri. served 4/24/72 by cert. mail #384 to Washington, D. C. 5 cc to U.S. Atty
	16	Filed & ent. U. S. MARSHAL'S RETURN On 3rd-party complaint: Gene M. Lear, Associate Admr., Agric. Ext. Serv., served 4/24/72 by Cert.Mail #383 to Washington, D.C. Asst. U.S. Atty., John R. Whitty, Raleigh, NC also served.
6/12/72	17	Filed & ent. REQUEST FOR PRODUCTION OF DOCUMENTS filed by U.S., Plff-interv. w/Cert. of Ser.

6/22/72	18	Filed & Ent. THIRD PARTY DEFENDANTS MOTION TO STRIKE OR IN THE ALTERNATIVE DISMISS THIRD PARTY COMPLAINT w/copy and cert service.
	19	Filed & Ent. MEMORANDUM OF THIRD PARTY DEFENDANTS IN SUPPORT OF MOTION TO STRIKE OR IN THE ALTERNATIVE TO DISMISS THIRD PARTY COMPLAINT w/copy and cert. service.
6/30/72	20	Filed & ent. DEFENDANT THIRD-PARTY PLAINTIFFS' RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS w/Cert. of Ser.
7/12/72	21	Filed & ent. DEFT. THIRD PARTY PLFFS'. RESPONSE TO MOTION TO STRIKE OR DISMISS THIRD-PARTY COMPLAINT, w/certificate of service. 2 copies.
	22	Filed & ent. MEMORANDUM IN SUPPORT OF DEFENDANT THIRD-PARTY PLAINTIFFS' RESPONSE TO MOTION TO STRIKE OR DISMISS THIRD-PARTY COMPLAINT. 2 copies.
7/17/72	23	Filed & ent. MOTION FOR ORDER REQUIRING INSPECTION OF DEFENDANTS RECORDS. 2 copies. (filed by plff.-intevenor.)

	24	Filed & ent. MEMORANDUM IN SUPPORT OF MOTION FOR ORDER REQUIRING INSPECTION OF DEFENDANTS RECORDS, filed by Plff.-Intervenor. 2 copies.
7/18/72	25	Filed & ent. ORDER REQUIRING INSPECTION OF RECORDS—deft. third-party plffs. permit plff-intervenor inspect and copy Items 1(f) and 2(c) in plff-intervenor's Request for Production of Documents previously filed herein; Clerk to service copies of this Order upon counsel. DUPREE, J. Civil OB 24, P. 7772.
7/21/72	26	Filed & ent. ORDER that Earl L. Butz, Sect. of Agri., & Gene M. Lear, Asso. Admr. of Federal Extension Ser., in indiv. & official capacities, are realigned as plff-intervenors. All claims & requests for relief set forth in 3rd-party Complaint are preserved as defenses and/or counterclaims. (DUPREE, J.) (Civ. O.B.#24,P.7787) 2 CC & 4 cys. to U.S.A.
7/21/72	27	Filed & ent. ORDER by consent that time within which discovery may be completed is extended to & including 1/10/73. (DUPREE, J.)(Civ.O.B.#24, P.7788) 2 CC & 4cys to U.S.A.

9/7/72	28	Filed & ent. INTERROGATORIES TO PLAINTIFFS propounded by defts. (State Depts.) w/Cert. of Ser.
9/25/72	29	Filed & ent. INTERROGATORIES TO DEFENDANTS BY PLAINTIFF-INTERVENORS
9/29/72		Filed & ent. CERTIFICATE OF SERVICE as to foregoing Interrogatories to Defendants by Plff.-Intervenors
	30	Filed & ent. PLAINTIFF-INTERVENORS' REQUEST FOR PRODUCTION OF COMPUTER MATERIALS w/Cert. of Service
10/18/72	31	Filed & ent. DEFENDANTS' ANSWERS TO INTERROGATORIES OF PLAINTIFF-INTERVENORS W/Cert. of Ser.
	32	Fil. & ent. DEFENDANTS' REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS w/Cert. of Ser.
11/17/72	33	Fil. & ent. DEFENDANTS' REQUEST FOR ADMISSION UNDER RULE 36 w/Cert. of Ser.
11/20/72	34	Filed & ent. RESPONSE TO DEFENDANTS' REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS w/Cert. of Ser., Attachments & Exhibits

11/27/72	35	Fil. & ent. INTERROGATORIES TO DEFENDANTS BY PLAINTIFF-INTERVENORS w/Cert. of Ser.
	36	Filed & ent. REQUEST FOR PRODUCTION OF DOCUMENTS w/Cert. of Ser. (Filed by plff.-intervenor)
11/30/72		Filed & ent. NOTICE OF TAKING DEPOSITIONS, by U.S.A., et al – plff-intervenors, of the following persons: Dr. George Hyatt, Jr., 12/11/72; Dr. C. D. Black, 12/12/72; Dr. Eloise Cofer 12/12/72 – at Ricks Hall, N.C.State Univ., Raleigh, NC & Dr. R.E. Jones, 12/12/72 at Coltrane Hall, A&T State Univ., Greensboro, NC.w/Cert. of Ser.
12/4/72	37	Filed & ent. DEFENDANTS' INTERROGATORIES TO PLAINTIFF-INTERVENORS w/Attachments
12/20/72	38	Filed & ent. PLAINTIFFS' ANSWER AND RESPONSE TO DEFENDANTS REQUEST FOR ADMISSION UNDER RULE 36/Cert. of Ser.
12/20/72		Filed & ent. MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANTS' REQUEST FOR ADMISSIONS UNDER RULE 36 of THE FEDERAL RULES OF CIVIL PROCEDURE w/Cert. of Ser.

	39	Filed & ent. ORDER extending time for U.S.A. to answer defendants' motion to & including 1/4/73. (DUPREE, J.) (Civ.O.B.#25,P.8140) 6 CC to U.S.A.
12/26/72	40	Filed & ent. REQUEST FOR PRODUCTION OF DOCUMENTS from State defts. by U.S. Plff.-Intervenor w/Cert. of Ser.
		Filed & ent. NOTICE OF TAKING DEPOSITIONS by U.S., et al., Plff.-Intervs., of following persons: 10:00 A.M., 1/3/73: Dr. George Hyatt, Jr.; 10:00 A.M., 1/4/73 Mrs. Ada Dalla Pozza, 2:00 p.m. Mrs. Minnie M. Brown; 9:00 A.M., 1/5/73 Dr. George Capel, J.E. Foil; 10:00 a.m., 1/8/73 R. Craig Wilburn; 1:30 p.m. T.C. Blalock; 9:30 a.m., 1/9/73 Paul Dew; 2:00 p.m., W.G. Andrews; 9:30 a.m., 1/10/73 J.C. Jones, 2:00 p.m. Grover Dobbins; & 9:30 a.m., 1/11/73 John E. Piland, w/Cert. of Ser.
1/2/73	41	Filed & ent. MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANTS' REQUEST FOR INTERROGATORIES UNDER RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE w/Cert. of Ser. 4 CC to U.S.A.

	42	Filed & ent. ORDER granting motion that U.S.A. be allowed extension of time to & including 1/23/73 in which to answer defendant's interrogatories. (DUPREE, J.) (Civ.O.B.#25, P.8191) 4 CC to USA (will serve order)
1/3/73		Filed & ent. DEPOSITION OF ROBERT E. JONES (Unopened by Clk.)
1/4/73	43	Filed & ent. PLAINTIFF-INTERVENORS' RESPONSE TO DEFENDANTS' REQUEST FOR ADMISSION UNDER RULE 36 w/Attachment & Cert. of Ser.
1/9/73		Filed & ent DEPOSITION OF DR. ELOISE COFER (Unopened by the Clk.)
1/15/73	44	Filed & ent. ORDER by consent that discovery time be extended to & including 3/23/73. (DUPREE, J.) (Civ.O.B.#25, P.8230) 3 CC to U.S.A. who will serve copies.
1/18/73		Fil. & ent. DEPOSITION OF DR. CHESTER BLACK (Unopened by Clk.)
1/23/73	45	Fil. & ent. ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFF INTERVENORS w/Cert. of ser.
2/14/73		Filed & ent. DEPOSITION OF GROVER C. DOBBINS. (Unopened by Clk.)

2/23/73		Filed & ent. DEPOSITION OF DR. GEORGE HYATT. (Unopened by Clk.)
3/1/73		Filed & ent. DEPOSITION OF DR. THOMAS C. BLALOCK (Unopened by Clk.)
3/5/73		Fil. DEPOSITION OF J. E. FOIL (Unopened by Clk) (Ent. 3/6/73) crs
3/16/73		Filed & ent. DEPOSITION OF JOHN PILAND (unopened by Clk.)
		Fil. & ent. DEPOSITION OF MINNIE BROWN (unopened by Clk.)
		Fil. & ent. DEPOSITION OF DR. GEORGE CAPEL (unopened by Clk.)
3/21/73	46	Fil. & ent. INTERROGATORIES TO DEFENDANTS BY PLAINTIFF-INTERVENORS w/Cert. of Ser.
3/30/73	47	Filed & ent. PLAINTIFFS ANSWERS TO INTERROGATORIES w/Cert. of Ser.
4/9/73		Filed & ent. DEPOSITION OF RONALD C. WILBURN (Unopened by Clk.)
		Fil. & ent. DEPOSITION OF ADA DALLA POZZA (Unopened by Clk.)
4/19/73		Filed & ent. DEPOSITION OF QUENTIN SWANSON (Unopened by Clk.)
		Filed & ent. DEPOSITION OF PAUL DEW (Unopened by Clk.)

4/20/73	48	Fil. & ent. DEFENDANTS' ANSWERS TO PLAINTIFFS INTERVENORS INTERROGATORIES Statement of service in transmittal letter. (Exhibits attached to answers)
5/7/73		Fil. & ent. DEPOSITION OF DR. W. G. ANDREWS (unopened by Clk.)
5/16/73		Filed & ent. DEPOSITION OF J. C. JONES (Unopened by Clk.)
5/18/73	49	Fil. & ent. DEFENDANT'S ANSWERS TO PLAINTIFF-INTERVENORS MARCH 20, 1973, INTERROGATORIES w/Exhibits
12/11/73		Set for Pre-trial and hearing on 3rd-party defts. Motion to Strike or in alternative Dismiss 3rd-party Complaint – 1/9/74 at 11:00 a.m. smf
12/26/73	50	Filed & ent. MOTION FOR LEAVE TO WITHDRAW AND FOR ORDER SUBSTITUTING OTHER COUNSEL FOR PLAINTIFFS: Atty Chambers has been appointed as a member of the Board of Governors of the U. of N.C. Charles Becton is also a member of said firm – Jerry Paul and James Rowan, 202 Rigsabee Ave., Durham, N.C. have been retained by the plfts. Cert. of Ser. B.H. Shapiro, U.S. Dept.

		of Justice, T. McNamara, U.S. Atty. EDNC., Raleigh, North Carolina, A.A. Vanore, Jr. Deputy Atty. General. P.O. Box 629, Raleigh, North Carolina mailed on 12/21/73. gw
1/3/74	51	Filed & ent. ORDER—firm of Chambers, Stein, Ferguson & Lanning, J. LeVonne Chambers, Esq., Charles Becton, Esq, are allowed to withdraw as counsel in this case. Motion hearing scheduled for 1/9/74 is cont'd until 2:00 p.m. on Friday, February 1, 1974, Courtroom #1, 7th Floor, Federal Building, Raleigh, North Carolina (DUPREE, J) CivOB#28P 9339 cc: attys. Paul, Becton, Chambers, Draw, Shapiro & Rich ag
1/18/74	52	Filed & ent. NOTICE OF APPEARANCE by Jerome Paul and Sylvia Drew on behalf of plffs. in this action. w/Cert. of Ser. jwt
1/25/74	53	Filed & ent. ORDER that matter scheduled to be heard in this case on 2/1/74 is now moot & the scheduled hearing is therefore continued. (DUPREE, J.)(Civ.O.B.#28, P.9427) CC to counsel jwt

4/1/74		Scheduled for pre-trial conference at Raleigh, Thurs., 4/25/74 at 12:30 P.M. Cy. to counsel, Judges Butler & Dupree & Ct. Rptr. jwt
4/5/74	54	Filed & ent. MOTION TO CONTINUE PRETRIAL CONFERENCE by all parties.
	55	Filed & ent. ORDER that pre-trial conf. scheduled for 4/25/74 is continued for at least 60 days. (DUPREE, J.) (Civ.O.B.#29, P.9678) Atty. Rich serving copies jwt
4/10/74		Filed & ent. CERTIFICATE OF SERVICE for Motion and Order filed on 4/5/74, service 4/8/74 by Atty. Rich. gw
11/13/74		Calendared for pre-trial conf. at Raleigh, Fri., 12/13/74 at 9:30 A.M. Cy. to Judges Butler & Dupree, Counsel & Ct. Rptr. jwt
11/27/74	56	Filed & ent. ORDER that pre-trial conf. scheduled for 12/13/74 is continued & will now be held at 11:00 a.m., Fri., 1/3/75 in Judge's Chambers, 716 Fed. Bldg., Raleigh, N.C. (DUPREE, J.) (Civ.O.B.#31, P.264) Cys. to counsel by Judge's office jwt

1/3/75	57 57-a	Filed & ent. MOTION TO CERTIFY AS CLASS ACTION and MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY AS CLASS ACTION w/Cert. of Ser. & Proposed Order
		Pre-trial conf. at Raleigh
	58	Filed & ent. PLAINTIFF-INTERVENORS' MOTION TO DISMISS, OR IN ALTERNATIVE TO STRIKE DEFENDANTS' COUNTERCLAIM w/Cert. of Ser. & Attachments & MEMORANDUM
1/2/75	59	Filed & ent. AFFIDAVIT PURSUANT TO RULE 7P of the RULES OF COURT OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA CONCERNING SANCTIONS FOR FAILURE TO COMPLY WITH PRETRIAL PROCEDURES w/cert. of ser.
1/3/75	60	Filed & ent. PLAINTIFF-INTERVENORS' PROPOSED STIPULATION OF FACT
	61	Filed & ent. STIPULATION of U.S.A. as to exhibits to be offered—signed by U.S. atty. only.
	62	Filed & ent. MEMORANDUM OF PRETRIAL COMPLIANCE by U.S.A. w/Attachments

	63	Fil. & ent. ORDER ON INITIAL PRE-TRIAL CONFERENCE—defts. to provide opposing counsel w/list of all exhibits proposed to be offered on or before 1/31/75; case to be tried to court w/out a jury & est. trial time is from 6 to 8 wks.; defts. have 20 days from this date to respond to motion to strike counterclaim as well as response to motion to have case certified as class action; final pre-trial conf. to be held in Chambers at Raleigh on Fri. 5/30/75 at 11:00 a.m. at which time trial time will be assigned. (DUPREE, J.) (Civ. O.B.#32,P.104) Cy. to counsel by Judge's office jwt
1/23/75	64	Filed & ent. DEFENDANTS' RESPONSE TO PLAINTIFF-INTERVENORS' MOTION TO DISMISS, OR IN THE ALTERNATIVE TO STRIKE DEFENDANTS' COUNTERCLAIM w/Cert. of Ser. Cy. to J. Dupree
	65	Filed & ent. BRIEF IN OPPOSITION TO PLAINTIFF-INTERVENORS' MOTION TO CERTIFY AS A CLASS ACTION w/Cert. of Ser. Cy. to J. Dupree
1/31/75	66	Received DEFENDANTS' EXHIBIT LIST and WITNESS LIST jt
2/7/75	67	Fil. & ent. ORDER that time within which plff.-intervenor, U.S.A., may file a Motion for

		Leave to Amend Complaint in Intervention is extended to & including 3/3/75. (DUPREE, J.) (Civ.O.B.#32,P.202) 2 CC & 3 cys. to U.S.A. jwt
2/14/75	68	Filed & ent. REPLY BRIEF IN SUPPORT OF UNITED STATES' MOTION TO CERTIFY AS A CLASS ACTION w/Exhibit A & Cert. of Ser. jwt
2/19/75	69	Filed & ent. AFFIDAVIT IN RESPONSE TO AFFIDAVIT FILED BY MARY A. PLANTY, DATED DECEMBER 31, 1974, PURSUANT TO RULE 7P OF THE RULES OF COURT OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA CONCERNING SANCTIONS. W/Cert. of Ser. jwt
2/28/75	70	Filed & ent. MOTION TO AMEND COMPLAINT IN INTERVENTION w/Proposed Amended Complaint in Intervention
	71	Fil. & ent. MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT IN INTERVENTION w/Cert. of Ser.
3/4/75	72	Filed & ent. MEMORANDUM OF AUTHORITIES ON THE

		ELEVENTH AMENDMENT BAR OF BACK WAGES filed by deft. w/Cert. of Ser.
3/6/75	73	Fil. w/Judge Dupree: MEMORANDUM OF AUTHORITIES ON WHETHER THE ELEVENTH AMENDMENT BARS BACK PAY IN THIS CASE filed by U.S.A. w/Cert. of Ser.
3/12/75	74	Fil. & ent. MOTION TO CERTIFY AS CLASS ACTION pursuant to R.23(c)(1), F.R.Civ.P. filed by plffs.
	75	Filed & ent. PLAINTIFF'S RESPONSE TO PLAINTIFF-INTERVENORS' MOTION TO AMEND COMPLAINT w/Cert. of Ser. jwt
3/20/75	76	Filed & ent. BRIEF IN OPPOSITION TO PLAINTIFF-INTERVENOR'S MOTION TO AMEND COMPLAINT IN INTERVENTION w/Cert. of Ser. (6 cys. to Atty. Manning. & cy. to J.Dupree by Mr. Manning) jwt
3/28/75		Filed & ent. REPLY TO PLAINTIFFS' MOTION TO CERTIFY AS CLASS ACTION w/Cert. of Ser. jwt
5/12/75	77	Calendared for hearing on all pending motions at Raleigh, Wed., 6/11/75 at 10:30 a.m. (Cy to counsel, Judges Butler & Dupree & Ct.Rptr.) jwt

6/16/75	78	Fil. & ent. SUPPLEMENTAL MEMORANDUM CONCERNING PENDING MOTIONS FOR LEAVE TO FILE AN AMENDED COMPLAINT IN INTERVENTION AND TO CERTIFY CASE AS A CLASS ACTION w/Cert. of Ser. jwt
1/23/76	79	NOTICE OF HEARING ON PENDING MOTIONS at 11:00 a.m., Fri., 2/13/76, Ctrm. #1, 7th Floor, Fed. Bldg., 310 New Bern Ave., Raleigh, N.C. (DUPREE, J.) Cy. to counsel, Clk. & Ct. Rptr. jwt
3/15/76		Filed & ent. TRANSCRIPT OF HEARING ON PENDING MOTIONS before Judge F. T. Dupree, Jr. Ctrm. #1, Fed. Bldg., Raleigh, N.C., on 2/13/76 at 11:00 a.m. jwt
9/13/76	80	Filed & ent. SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES w/attachments & Cert. of Ser. (Cy. furnished Judge by US) jwt
10/25/78	81	MOTION TO SUBSTITUTE COUNSEL – James V. Rowan, atty. for pltfs. moves for court order permitting substitution of Cressie Thigpen in his place. w/cs. lc: Judge Dupree
10/25/78	82	NOTICE OF APPEARANCE – by Cressie H. Thigpen, Jr. and Edward D. Reibman. w/cs lc: Judge Dupree.

11/16/78	83	ORDER – James V. Rowan is allowed to withdraw as counsel for pltfs. and Cressie Thigpen, Esq., Raleigh, N.C. is substituted as counsel in his stead. (Dupree, J) Civ. OB#47, P. 297. lc: counsel of record. (ent. 11/16/78)
11/17/78		PLAINTIFF-INTERVENOR'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO AMEND COMP in intervention w/attachments & w/cs.
12/13/78	85	PRE-TRIAL AND MOTION HEARING: (J. Dupree): 10:00 A.M. on Friday, December 29, 1978 at Courtroom No. 1, 7th Fl. 310 New Bern Ave., Raleigh, N.C. Cy to: Mr. Edward D. Reibman, Mr. Cressie H. Thigpen, Jr., Mr. Jerry E. Keitl , Mr. Howard E. Manning and Mr. Millard R. Rich, Jr. trj
4/2/79		TRANSCRIPT OF HEARING ON MOTIONS AND PRE-TRIAL HEARING before Hon. Franklin T. Dupree, Jr., Raleigh, N.C., Fri., 12/29/78 at 10:00 a.m. (Pgs. 1-70 – Ervin B. Bush, Ct. Rptr.)
6/4/79	86	MOTION TO RE-OPEN DISCOVERY by plff. Intervenor, U.S.A. w/cs jwt

6/20/79	87	DEFENDANTS' RESPONSE TO PLAINTIFF-INTERVENOR'S MOTION TO RE-OPEN DISCOVERY. w/cs jwt
6/22/79	88	MOTION TO RE-OPEN DISCOVERY – plffs. join plff.-intervenor's Motion to Re-Open Discovery
	89(2a)	MEMORANDUM IN SUPPORT OF MOTION TO RE-OPEN DISCOVERY. w/cs jw:
10/9/79	90	MEMORANDUM OF DECISION AND ORDER denying pltfs'. motion to dismiss the counterclaim; and allowing parties to & incl. 2/1/80 to complete discovery; also that class certification of the pltf. employee class is denied; pltf's. motion to certify the deft. class is denied for lack of subject matter jurisdiction; U.S. motion to amend intervention complaint is allowed insofar as it alleges racial discrimination but denies it insofar as it alleges sexual discrimination. (J.DUPREE) (Civ.O.B.#54,P.41) cc to counsel. pgn
10/19/79	91	MOTION FOR ENLARGEMENT OF TIME TO ANSWER OR OTHERWISE PLEAD TO AMENDED COMPLAINT. w/cs

10/22/79	92	ORDER extending time w/n which defts. may answer or otherwise plead to Amended Complaint in Intervention to & including 11/1/79. (DUPREE, J.) (Civ.O.B.#54,P.155) CC to counsel jwt
11/1/79	93	DEFENDANTS' ANSWER TO AMENDED COMPLAINT IN INTERVENTION – w/cs. sbd
	94	REQUEST FOR ENTRY OF DEFAULT AGAINST PLAINTIFF-INTERVENORS – w/cs. sbd
11/5/79	95	MOTION TO RECONSIDER MEMORANDUM OF DECISION AND ORDER DATED, FILED AND ENTERED ON OCTOBER 9, 1979 – w/cs.
	96	MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OF DECISION AND ORDER DATED, FILED AND ENTERED ON OCTOBER 9, 1979 – w/cs sbd
11/6/79	97	ENTRY OF DEFAULT – Entered agst. the plff-intervenors as provided by R. 55(a), F.R.Civ.P. (Clk. J. Rich Leonard) Civ.OB #54,p.276. cc to counsel. sd
11/19/79	98	DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER MEMORANDUM OF DECISION AND

		ORDER DATED, FILED AND ENTERED ON OCTOBER 9, 1979 w/cs. sd
	99	AMENDMENT TO ANSWER TO AMENDED COMPLAINT IN INTERVENTION – w/cs.
11/16/79	100	MOTION TO SET ASIDE DEFAULT – Pur. to R. 55(c) & 60(b), F.R.C.P., plff-interv. move to set aside default entered on 11/6/79. w/cs. sd
	101(2a)	MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE DEFAULT – by plff-interv. sd
11/19/79	102	DEFENDANTS' RESPONSE TO PLFF-INTERVS' MOTION TO SET ASIDE DEFAULT – w/cs.
12/7/79	103	PLAINTIFF INTERVENORS' MOTION FOR LEAVE TO FILE OUT OF TIME – w/Proposed Answer & Memorandum. w/cs. sd
12/10/79	104(2b)	PLAINTIFFS' INTERROGATORIES – RE: MACHINE READABLE DATA w/cs jwt
12/14/79	105(2b)	DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET –
	106	DEFENDANTS' RESPONSE TO PLAINTIFF-INTERVENORS' MOTION FOR LEAVE TO FILE OUT OF TIME – w/cs. s d
1/4/80	107(2b)	PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S JOINT INTERROGATORIES TO DEFTS. w/cs. pg

1/8/80	108	MOTION FOR A PROTECTIVE ORDER PUR. TO R.26(c) of F.R.Civ.P. – by defts.
	109(2b)	DEFTS' ANSWERS TO PLFFS' INTERROGATORIES RE: MACHINE READABLE DATE – w/cs.
1/10/80	110(2)	MOTION TO ENLARGE TIME FOR DISCOVERY – by USA, to 6/2/80.
	111(2a)	MEMORANDUM OF PLFF-INTERV. U.S. IN SUPPORT OF ITS MOTION TO ENLARGE THE TIME FOR DISCOVERY w/cs.
1/11/80	112	ORDER – on motion by defts., depositions noticed for 1/14/80 be postponed until plffs & plff-interv. have responded to defts' motion. (HOWELL, U.S.M.) cc to counsel. (Ent. 1/11/80)
	113	JOINT NOTICE OF TAKING DEPOSITIONS – Plffs. & Plff-Interv. will jointly take depositions of listed people. w/cs. sd
1/14/80	114(2b)	MOTION FOR EXTENSION OF TIME WITHIN WHICH TO ANSWER INTERROGATORIES – Plffs. request an additional 30 days w/in which to answer. w/cs. sd
1/23/80	115	(Red Jacket) Plaintiffs' ANSWERS TO INTERROGATORIES – FIRST SET: for following Plffs: Richard M. Edwards, Chester L. Bright, Pennie P. Battle, W.E. Wright, Booker T. McNeill, Percy W.

		Williams, Clifton M. Grimes, Haywood E. Harrell, James E. Wright, Minnie B. Taylor, Johnnie Jones, III, Mary C. Martin, Chester Stocks, W.N. Payton, Jr., Fletcher Barber. w/cs
1/25/80	116(2a)	MEMORANDUM IN SUPPORT OF PLFFS' MOTION TO RECONSIDER MEMORANDUM OF DECISION AND ORDER DATED, FILED AND ENTERED ON October 9, 1979. w/cs.
	117	(Red Jacket) PLAINTIFFS' ANSWERS TO INTERROGATORIES – FIRST SET – For following Plffs: George W. Koonce, Natalie S. Wimberly, Luther D. Baldwin, Earl G. Swann, Plese Corbett, Martha B. Thomas, Jeanette B. Sherrod, Margaret L. Baldwin, Calvin Hargrove, Jr., Albrey Lee Jones, P.E. Bazemore.
1/28/80	118	PLFFS' REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER – w/cs.
	119	(Red Jacket) PLFFS' ANSWERS TO INTERROGATORIES – FIRST SET for Avant P. Coleman, Margaret J. Woods, Henry Revell, Jr., Fred Belfield, Jr., Victoria B. Bynum, Annie P. Costen Gilmer, w/cs.

1/31/80	120	PLAINTIFF-INTERVENORS' RESPONSE TO MOTION OF DEFTS' FOR PROTECTIVE ORDER – w/cs.
2/14/80	121(2b)	MOTION TO COMPEL ANSWERS TO DEFTS' INTERROGATORIES DIRECTED TO PLFFS – w/cs.
2/19/80	122	MEMORANDUM – Defts. motion for a protective order is deferred at least until plffs. have responded to mc:ion to compel. (HOWELL, U.S.M. (Civ.OB#56, p.193) cc to counsel. sd
2/29/80	123	PLAINTIFFS' RESPONSE TO DEFTS' MOTION TO COMPEL ANSWERS TO DEFTS' INTERROGATORIES DIRECTED TO PLFFS – w/cs. cy. to Howell
2/29/80	124	PLAINTIFFS' ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLFF – FIRST SET – for (Red Jacket) Riddick Earl Wilkins, Leonard C. Cooper, Bertha Bethel Forte, Alma C. Hobbs, Hernando F. Palmer, w/cs.
3/17/80	125	PLAINTIFFS' ANSWERS TO DEFTS' INTERROGATORIES TO PLFF. – FIRST SET – for (Red Jacket) Geraldine H. Ray, Clifton Parker, Marilyn White Rich, Esther B. Winston. sd

4/1/80	126	PLAINTIFFS ANSWERS TO DEFENDANTS' INTER-ROGATORIES TO PLAIN-TIFFS – FIRST SET – for (Red Jacket) David B. Waymer. cgh
11/19/80		Scheduled for a motion hearing at 10:15 a.m. on 12/1/80 before Magistrate Howell in Raleigh, N.C. cgn
11/24/80		Cont'd. to 12/15/80 at 4:15 P.M. before Howell in Raleigh – jwt
12/5/80	127(b)	PLAINTIFF'S ANSWER TO DEFTS' INTERROGATORIES TO PLTFS – FIRST SET – for Inez Foster. mk
	128(b)	PLAINTIFF'S ANSWERS TO DEFTS' INTERROGATORIES TO PLTFS – FIRST SET – for Louise Penn Slade. mk
	129(b)	PLAINTIFF'S ANSWERS TO DEFTS' INTERROGATORIES TO PLFTS – FIRST SET – for George E. McDaniel. mk
	130(b)	PLAINTIFF's ANSWERS TO DEFTS' INTERROGATORIES TO PLTFS – FIRST SET – for Carrie Lindsey Thompson. mk
	131(b)	PLAINTIFF'S ANSWERS TO DEFTS' INTERROGATORIES TO PLTFS – FIRST SET – for Robert Lee Lancaster. mk
12/19/80	132	PLAINTIFF-INTERVENORS' RESPONSE TO ADDI-TIONAL MEMORANDUM IN SUPPORT OF *MOTION FOR PROTECTIVE ORDER* – w/cs. mvk

1/15/81	133(b)	PLAINTIFF'S ANSWERS TO DEFENDANTS' INTER-ROGATORIES TO PLAIN-TIFFS – FIRST SET – for Ernest C. Short – w/cs. tt
	134(b)	PLAINTIFF'S ANSWERS TO DEFENDANTS' INTER-ROGATORIES TO PLAIN-TIFFS – FIRST SET – for Slayter T. Lloyd – w/cs. tt
	135(b)	PLAINTIFF'S ANSWERS TO DEFENDANTS' INTER-ROGATORIES TO PLAIN-TIFFS – FIRST SET – for Mary Irene Parham – w/cs. tt
	136(b)	PLAINTIFF'S ANSWERS TO DEFENDANTS' INTER-ROGATORIES TO PLAIN-TIFFS – FIRST SET – for Jo Ann Fleming Carter – w/cs. tt
	137(b)	PLAINTIFF'S ANSWERS TO DEFENDANTS' INTER-ROGATORIES TO PLAIN-TIFFS – FIRST SET – for Judy Herring Wallace – w/cs. tt
	138(b)	PLAINTIFF'S ANSWERS TO DEFENDANTS' INTER-ROGATORIES TO PLAIN-TIFFS – FIRST SET – for William C. Stroud – w/cs. tt
	139(b)	PLAINTIFF'S ANSWERS TO DEFENDANTS' INTER-

ROGATORIES TO PLAINTIFFS – FIRST SET – for Leroy James – w/cs. tt

140(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Iley Wiley Murfree – w/cs. tt

141(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Dorothy M. Hearne – w/cs. tt

142(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Mary B. Crawford – w/cs. tt

143(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Lloyd L. Peace – w/cs. tt

RECEIVED ON 3/17/81 – RESPONSE OF ESTHER B. ROSCOE WINSTON in addition to her Answer to Interrogatories (#125, filed 3/17/80). mk

RECEIVED ON 3/6/81 – RESPONSE OF ROBERT LANCASTER in addition to his Answer to Interrogatories (#131, filed 12/5/80). mk

RECEIVED ON 3/6/81 – RESPONSE OF CARRIE THOMPSON in addition to her Answer to Interrogatories (#130, filed 2/5/80). mk

RECEIVED ON 3/6/81 – RESPONSE OF HAYWOOD HARRELL in addition to his Answer to Interrogatories (#124, filed 2/29/80). mk

RECEIVED ON 3/6/81 – RESPONSE OF LEONARD COOPER in addition to his Answer to Interrogatories (#124, filed 2/29/80). mk

5/5/81 Letter from Clerk to counsel of record asking for a stip. on discovery. If they cannot agree, a status conference will be scheduled for the week of June 1, before Magistrate McCotter. cgh

6/2/81 144 ORDER – Upon consent of the parties, the discovery period in this action will conclude on October 30, 1981, w/ a final pretrial conference and trial to be scheduled thereafter as the docket permits. (CIV. O.B. #62, p. 208) (LEONARD, clerk) – cc to counsel. mk

6/19/81 ISSUED NOTICE OF HEARING ON PENDING MOTIONS at 10.00 a.m. Fri., 7/17/81 in Raleigh in Ctrm. #1, 7th Floor, P.O. & Cthse. before Judge Dupree.

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*Entries #127-131 and 133-143 in separate folders

6/30/81		ISSUED NOTICE OF NON-JURY TRIAL Mon., 12/7/81 at 10:00 a.m., Raleigh, NC, Ctrm. #1, before Judge Dupree. jwt
7/15/81	145(3a)	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE DEFAULT AND MOTION TO FILE OUT OF TIME. w/cs & attachment (Cy. to J. Dupree) jwt
7/24/81	146(3a)	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER MEMORANDUM OF DECISON AND ORDER DATED, FILED AND ENTERED ON 10/9/79– concludes that pltfs' request that they be certifed as representatives of the class consisting of all black professional employees of the NCAES since 11/18/71 be granted – w/cs and attachments. tt
*7/15/81	147(3a)	SUPPLEMENTAL MEMORADUM IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER MEMORANDUM OF DECISION AND ORDER DATED OCTOBER 9, 1979 – pltfs request they be certified as representatives of the class consisting of all black employees of the NCAES since 11/18/71 and thereafter – w/attachments. tt

7/27/81	148(3a)	DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER THE DENIAL OF CLASS ACTION STATUS BY ORDER OF OCTOBER 9, 1979 – defts. respect. submit that this action not be certified as a class action, and that the Court's Order of 10/9/79 w/respect to class certification remain in effect – w/cs. tt
7/29/81		AFFIDAVIT OF HERNANDO PALMER – to be attached to Pflt's Supp. Memo. in Support of Pltfs' Motion to Reconsider Memo. of Decision & Order, Filed and Entered on 10/9/79 filed 7/24/81 tt
7/29/81	149	ORDER – The Court makes the following rulings on various pending motions heard on July 17, 1981: Plft's motion to reconsider the Court's order of Oct. 9, 1981: Pltf's motion to reconsider the Court's order of Oct. 9, 1979 denying the motion for certification of a pltf & deft. class under Rule 23 of the F.R.C.P. is denied for the reasons set forth in the court's order of Oct. 9, 1979; the motion of pltf-intervenors to set aside the default entered against them on

		Nov. 6, 1979, is allowed; the deft's motion for a protective order, filed on January 8, 1980, is denied; deft's motion to compel, filed on Feb. 14, 1980, is allowed & pltfs are directed to continue their efforts to complete their answers to defts' interrogatories. (CIV. O.B. #63, p. 10) (DUPREE, J.)—cc to counsel. mk
8/12/81		DEPOSITION OF DR. CHESTER D. BLACK—taken 7/7/81 at 10:00 a.m. in Raleigh, N.C. tt
		DEPOSITION OF DR. THOMAS C. BLALOCK—taken 7/7/81 at 3:30 p.m. in Raleigh, N.C. tt
8/24/81	150	SUGGESTION FOR SUBSTITUTION OF PUBLIC OFFICIALS—by pltf.-intervenor—w/cs. tt
8/27/81	151(3b)	ANSWERS TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' JOINT INTERROGATORIES TO DEFENDANTS—w/cs & attachments (attachments in separate folder)
9/10/81	152(3b)	DEFENDANTS' INTERR. DIRECTED TO PLAINTIFF-INTERVENORS U.S.A.—w/cs. tt
9/21/81		ISSUED NOTICE OF FINAL PRE-TRIAL CONFERENCE before USM McCotter, in Raleigh, Mon., 11/2/81, USM Ctrm., 6th Floor, Cthse., 310

		New Bern Ave., at 10:15 A.M. jwt
9/24/81		Calendared for Non-jury trial in Raleigh, Ctrm. #1, before Judge Dupree. jwt
9/29/81	153(3a)	DEFENDANTS' SECOND SET OF INTERROGATORIES DIRECTED TO PLAINTIFF-INTERVENORS UNITED STATES OF AMERICA—w/cs. tt
10/6/81		Case file to J. Dupree, w/request for handling of dispositive motion (Request for Substitution of Public Officials by pltf.-intervenor).
10/8/81	154	ORDER—John R. Block as Sec. of Agriculture is to be substituted as pltf.-intervenor herein in place of Earl L. Butz, one of pltf.-intervenors of record, & Dr. Mary Nell Greenwood as Deputy Director, Science & Ed. Administration-Extension is to be substituted as pltf-intervenor herein in place of Gene N. Lear, one of pltf.-intervenors of record—(DUPREE, J.) (CIV. O.B. #63, p. 199) cc counsel tt
	155	ORDER RELATING TO DISCOVERY MATTERS AND FINAL PRE-TRIAL CONFERENCE—pltf.-intervenor, U.S., shall have until 11/2/81 in which to file & deliver to defts. & pltf. answers to defts' interr.; time in which defts. may engage

in discovery shall be extended through 11/16/81 provided that depos will be completed by 11/16/81, defts. will submit any add. written discovery to pltf.-intervenors by Express Mail or Fed. Express on or before 11/5/81, & pltf-intervenors will cooperate in making individuals available for depos during that period through 11/16/81; pltf.-intervenors will submit answers to any add. written discovery filed by defts. by Express Mail or Fed. Express mailed on or before 11/19/81 provided such answers can be obtained through reasonable efforts; & Final Pre-Trial Conference will be re-scheduled from 11/2/81 until 11/23/81 at 10:00 a.m.—signed by counsel—(LEONARD, M.) (CIV. O.B. #63, p. 201) cc counsel tt

10/12/81 ISSUED NOTICE RESCHEDULING FINAL PRE-TRIAL at Raleigh, Mon., 11/23/81 at 10:00 am before USM Leonard in USM Ctrm., 6th Floor, Cthse. jwt

10/26/81 153(#3a) PLAINTIFFS' INTERROGATORIES TO DEFENDANTS for the following Plaintiffs: RICHARD M. EDWARDS, CHESTER L. BRIGHT, PENNIE P. BATTLE, W. E. WRIGHT, BOOKER T.

McNEILL, PERCY W. WILLIAMS, CLIFTON M. GRIMES, HAYWOOD E. HARRELL, JAMES E. WRIGHT, MINNIE B. TAYLOR, JOHNNIE JONES III, MARY C. MARTIN, CHESTER STOCKS, W. N. PAYTON, JR., FLETCHER BARBER, ALMA C. HOBBS, LEONARD C. COOPER, HOOVER ROYALS, JUDY HERRING WALLACE, JOANN F. CARTER, MARY B. CRAWFORD, GEORGE W. KOONCE, NATALIE S. WIMBERLY, LUTHER D. BALDWIN, EARL G. SWANN, PLESE CORBETT, MARTHA B. THOMAS, JEANNETE B. SHERROD, MARGARET L. BALDWIN, CALVIN HARGROVE, JR., ALBREY LEE JONES, P. E. BAZEMORE, MARGARET J. VOODS, AVANT P. COLEMAN, HENRY REVELL, JR., FRED BELFIELD, JR., VICTORIA B. BYNUM, ANNIE P. COSTEN GILMER, J. M. SPAULDING, MARY I. PARHAM, SLAYTER T. LLOYD, LEROY JAMES, RIDDICK E. WILKINS, BERTHA B. FORTE, HERNANDO PALMER, GERALDINE H.

RAY, CLIFTON PARKER, MARILYN W. RICH, ESTHER B. WINSTON, DAVID B. WAYMER, ROBERT L. LANCASTER, INEZ W. FOSTER, GEORGE E. McDANIEL, CARRIE L. THOMPSON, LOUISE P. SLADE, ILEY W. MURFEE, LLOYD L. PEACE, DOROTHY M. HEARNE, ROOSEVELL LAWRENCE, WARREN BARNES, ERNEST C. SHORT & WILLIAM C. STROUD—w/cs. tt

10/14/81 156(3a) PLAINTIFF-INTERVENOR UNITED STATES' INTERROGATORIES TO DEFENDANTS THIRD SET—w/cs. t

10/20/81 157 *MOTION FOR ORDER TO COMPEL DISCOVERY*—pltf.-intervenor U.S.A. moves the Court to order defts.' agent Z. Harrell, Co. Extension Chrmn. in Gates Co., N.C. to respond to questions on oral depo re his knowledge of events which culminated in M. Woods' grievance hearing on 11/16/77; & to order defts.' agents, in course of depos, to respond to questions re their knowledge of practices which are alleged to discriminate or to have discriminated on the basis of race—w/cs. tt

10/20/81 158(3b) MEMORANDUM IN SUPPORT OF MOTION FOR ORDER TO COMPEL DISCOVERY—by pltf.-intervenor—w/cs. tt

10/21/81 159 DEFTS' RESPONSE TO MOTION TO COMPEL DISCOVERY—w/cs & attachments. cgh

160(3a) Objections & Answers to Interr. Submitted by Pltfs. to Defts. by Letter of Sept. 24, 1981—w/cs & attachments

*10/23/81 161 MOTION by deft. for an order prohibiting all further interviews of employees of deft. NCAES without the knowledge of defts.; notification of employees already interviewed; copies of all statements obtained; no evidence obtained by means of such interviews be used as evidence at the trial of this action; . . .—w/cs. cgh

Letter from Fed. Government's counsel correcting Para. #4 of interr. mailed on 10/14/81. cgh

10/26/81 162 ORDER—pltf.-inter.' motion to compel is denied. Pltf.-Inter.'s mot. to compel deponet Harrell to ans. the propounded questions is allowed. By 11/3/81, counsel for pltfs. are to examine the existing employee list in pltf.-inter. possession. Counsel for pltfs. are then to examine the

discovery files of pltf.-inter. to discover whether the personnel record have already be produced. If records of relevant employees are not available to pltf., pltfs. may file a request for production of docu. requiring defts to produce the personnel records of these employees for copying at pltfs' expense. Such request should be filed no later than 11/6/81. Records should be produced at a mutually convenient time prior to 11/11/81. Failure of pltfs. to comply with this timetable will preclude any further discovery in this area. (CIV O.B. #63, p. 256) (LEONARD, U.S.M.) CC to counsel. cgh

10/27/81	163	MOT. FOR SEPARATE TRIAL OF THE ISSUES OF LIABILITY & PROSPECTIVE RELIEF FROM THOSE OF INDIVIDUAL RELIEF BY pltf.-inter. – w/cs. cgh
	164(3b)	MEMO. IN SUPPORT OF MOT. TO SEPARATE THE ISSUES OF LIABILITY & PROSPECTIVE RELIEF FROM THAT OF INDIVIDUAL RELIEF – w/cs. cgh
*10/23/81		ISSUED NOTICE OF HEARING ON MOTION FOR PROTECTIVE ORDER at 1:00 p.m., Wed., 10/28/81 in Raleigh, USM Ctrm., 6th Floor, PO & Cthse., before USM Leonard.
10/27/81		Hearing changed to Thurs., 10/29/81 at 11:00 a.m., before Judge Dupree in Ctrm. No. 1. jwt
10/28/81	165(3b)	MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION REGARDING INTERVIEWS WITH NCAES EMPLOYEES w/attachments & cs (Cy. to J. Dupree) jwt
10/29/81	166	FACTUAL BACKGROUND IN DISCOVERY SINCE THE COURT'S ORDER OF 10/9/81 by deft. Motion hearing held before J. Dupree in Raleigh. Edward D. Riebman, Cressie H. Thigpen, Jr., Squire Padgett & Burton Craige for pltfs; Howard E. Manning, Sr. & Howard E. Manning, Jr. for defts. Plfts. were directed to give the defts. a list of the persons interviewed by the FBI & to ans. interr. by 11/2/81. Judge to decide on the bifarcation issue shortly.
	167	ORDER – pltfs. to provide counsel for deft. names of all persons in employment of defts. who have been interviewed or are to be interviewed by agents of FBI re this action; pltfs. are not required to disclose to defts.' counsel statements of info ob-

tained by FBI agents from defts.' employees, but pltfs. are required to answer the outstanding interr. previously served upon them by defts. on or before 11/2/81; defts.' motion to disqualify opposing counsel was w/drawn; this order is w/out prejudice to defts.' right to move to reopen their motion w/respect to any person whose name appears on the list of person furnished defense counsel today who is alleged to have been improperly interviewed because of his or her position in the employment of defts.; the court will consider pltfs.' motion to bifurcate the scheduled trial of this action on 12/7/81 & enter a ruling thereon w/out further argument unless it is determined that a more detailed written response by defts. to the motion will be necessary prior to decision—(Dupree, J.) (CIV O.B. #63, p. 266) cc counsel tt

11/2/81 168 ORDER—upon motion of plff.-intervernor, U.S.A., for separate trial of the issue of liability & prospective relief from those of individual relief filed 10/27/81, the court being of opinion that the interests of judicial economy will not be

served by such separation, it is Ordered that the motion be and the same is hereby denied. (Dupree, J.) (Civ. OB #63, p. 273) cc to counsel. sm

11/2/81 169 Rec'd copy of MOTION TO SHORTERN TIME FOR DEFTS. TO RESPOND TO PLFF.-INTERVENOR'S

11/4/81 169a (FILED) REQUEST TO ADMIT OR IN THE ALTERNATIVE INTERROGATORIES—FOURTH SET

170 Rec'd copy of MEMORANDUM IN SUPPORT OF MOTION TO SHORTEN TIME FOR DEFTS. TO RESPOND TO PLFF.-INTERVENOR'S REQUEST TO ADMIT OR IN THE ALTERNATIVE INTERROGATORIES FOURTH SET

171(3a) FIRST REQUEST OF UNITED STATES OF AMERICA, PLAINTIFF-INTERVENORS, FOR THE ADMISSION OF MATTERS BY THE DEFENDANTS, WILLIAM C. FRIDAY, ET AL, OR IN THE ALTERNATIVE INTERROGATORIES-FOURTH SET APPENDIX A-E (Red Jacket)

172 DEFTS.' RESPONSE TO U.S. MOTION FOR SEPARATE TRIAL OF ISSUES OF LIABILITY AND PROSPEC-

TIVE RELIEF FROM THOSE OF INDIVIDUAL RELIEF (Cy. to Judge by Atty. Manning.)

173 DEFTS.' RESPONSE TO U.S. MOTION TO SHORTEN TIME IN WHICH DEFTS. HAVE TO RESPOND TO REQUESTS FOR ADMISSION OR IN THE ALTERNATIVE INTERROGATORIES—FOURTH SET AND OBJECTIONS, RESPONSE TO PLAINTIFFS' MOTION TO ENLARGE TIME FOR DISCOVERY AND MOTION FOR A PROTECTIVE ORDER (Cy. to J. Dupree by Atty. Manning) jwt

11/3/81 174(3a) PLAINTIFF-INTERVENOR'S ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANTS, William C. Friday, et al.—w/cs. cy. J. Dupree tt

175 PLTFS' RESPONSF TO MOTION FOR SEPARATE TRIAL OF THE ISSUES OF LIABILITY AND PROSPECTIVE RELIEF FROM THOSE OF INDIVIDUAL RELIEF AND CLARIFICATION OF PLTFS' POSITION—w/cs. cy. J. Dupree tt

176 *MOTION TO ENLARGE TIME FOR DISCOVERY*—pltfs. request that discovery time for pltfs. be extended to 11/16/81—w/cs. cy J. Dupree tt

177 *MOTION TO COMPEL ANSWERS TO DEFTS' INTERR. DIRECTED TO U.S.A., 1ST AND 2ND SETS, MOTION FOR SANCTIONS*—deft. pray for an Order directing the U.S. to fully & completely answer outstanding interr. immediately; & for such other & further relief & sanctions as may be imposed pursuant to Rule 37, F.R.Civ.P.—w/cs & attach. cy. J. Dupree tt

178 ORDER—defts' motion for a protective order relieving them of the necessity of responding to pltfs' last-minute discovery is allowed & pltfs' motion to enlarge the time for completing discovery, filed since the dictation of this Order began, is denied—(DUPREE, J.) (CIV O.B. #63, p. 286) cc counsel tt

11/5/81 179(3a) DEFENDANTS' INTERROGATORIES DIRECTED TO THE U.S.—3RD SET AND REQUESTS FOR ADMISSIONS—w/cs. tt

11/6/81 180 *PLAINTIFF-INTERVENORS' MOTION FOR LEAVE TO FILE OUT OF TIME*—pltf-intervenors' request leave of this

		Court to file out of time the attached Response to Defts.' Interr. – w/proposed Order. cy. J. Dupree tt
	181(3b)	PLAINTIFF-INTERVENORS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL AND IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE OUT OF TIME AND MOTION FOR SANCTIONS – w/cs. cy. J. Dupree tt
11/6/81	182(3a)	REQUEST FOR PRODUCTION OF DOCUMENTS – w/cs. mk
11/10/81	183	MOTION TO RECONSIDER ORDER GRANTiNG DEFENDANTS' MOTION FOR A PROTECTIVE ORDER – by U.S.A. – w/cs. Cy. to J. Dupree. cgh
	184(3b)	MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER ORDER GRANTING DEFTS' MOTION FOR A PROTECTIVE ORDER by U.S.A. – w/cs. Cy. to J. Dupree. cgh
11/12/81	185	DEFENDANTS' RESPONSE TO MOTION TO RECONSIDER DEFENDANTS' MOTION FOR A PROTECTIVE ORDER – w/cs & attach. cy. J. Dupree tt

	186	ORDER – motion to compel answers to interr. 1-12 & 85-88 is denied w/out prejudice to defts' right to renew the motion for sanctions should the info be later found in a form that the U.S. should have uncovered w/reasonable diligence; pltf-intervenor is directed to obtain & produce for defts. whatever documents re number of black employees w/particular degree for a particular year on or before 11/17/81; pltf-intervenors are directed to respond to interr. 17-38, 39-52 & 67-80 as propounded & w/specificity on or before 11/18/81; pltf-intervenor is directed to answer interr. 81-84 on or before 11/18/81; this case remains on the 11/23/81 pre-trial calendar & the 12/7/81 trial calendar – (LEONARD, M.) (CIV O.B. #63, p. 305) cc counsel tt
11/13/81	187	DEFENDANTS' OBJECTIONS TO PLAINTIFF-INTERVENORS UNITED STATES' INTERROGATORIES TO DEFENDANTS' – THIRD SET, MOTION FOR A PROTECTIVE ORDER – defts. prays for a Protective Order permitting defts. not to answer the third set of interr. from the U.S. – w/cs. tt

	188	ORDER – pltfs' motion to reconsider order granting defts' motion for protective order filed 11/10/81 is denied – (DUPREE, J.) (CIV O.B. #63, p. 309) cc counsel tt
11/17/81	189(3b)	SUPPLEMENTAL MEMORANDUM IN-SUPPORT OF MOTION TO RECONSIDER ORDER GRANTING DEFENDANTS' MOTION FOR PROTECTIVE ORDER – by pltf-intervenors – w/cs & attach. tt
	190(3b)	MEMORANDUM IN RESPONSE TO DEFENDANTS' OBJECTIONS TO THE UNITED STATES' THIRD SET OF INTERROGATORIES AND IN RESPONSE TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER – by pltf.-intervenors – w/cs & attach. tt
	191	ORDER – pltfs.' motion to compel production of the approximately 350 personnel data cards is denied; defts. not having objected to production of the 31 personnel records sought, that issue is now moot – (LEONARD M.) (CIV O.B. #63, p. 318) cc counsel tt
		Memo to Counsel of Record advising that Judge Dupree will conduct the final pre-trial conference on 11/23/81 in Ctrm. #1 at time scheduled. tt

11/17/81	192(3a)	PLAINTIFF-INTERVENOR'S ANSWERS TO DEFENDANTS' INTERROGATORIES THIRD SET AND ANSWERS TO REQUESTS FOR ADMISSIONS – w/cs. tt
	193(3a)	PLAINTIFF-INTERVENOR'S SUPPLEMENTAL ANSWERS (PART I) TO INTERROGATORIES PROPOUNDED BY DEFENDANTS, WILLIAM C. FRIDAY, ET AL. – w/attach. (2 & 3 in separate folder) & cs. tt
11/19/81	194(3a)	PLAINTIFF-INTERVENOR'S SUPPLEMENTAL ANSWERS (PART II) TO INTERROGATORIES PROPOUNDED BY DEFENDANTS, WILLIAM C. FRIDAY, ET AL. – w/cs & attach. tt
	195	ORDER – defts.' motion for a protective order permitting defts. not to answer the 3rd set of interr. from the U.S. is allowed – (DUPREE, J.) (CIV O.B. #63, p. 323) cc counsel
11/20/81	196	*MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIM* – by pltf. – intervenors John R. Block, Sec. of Agriculture & Mary Nell Greenwood, Administrator of the Federal Extension Service – w/cs. tt

	197(3b)	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM – by pltf. – intervenors – w/cs. tt (Joh R. Block, Sec. of Agriculture & M. N. Greenwood, Administrator of the Federal Extension Service)
11/20/81	198	*MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND MOTION FOR DISCOVERY SANCTIONS* – pltf. – intervenor U.S.A. moves the Court to compel defts. to answer U.S.' Interr. to Defts. 3rd Set, filed 10/14/81, before the final pre-trial conference scheduled for 11/23/81 – w/cs. tt
	199(3b)	MEMORANDUM IN SUPPORT OF MOTIONS TO COMPEL ANSWERS TO INTERROGATORIES AND FOR DISCOVERY SANCTIONS – by pltf. – intervenor U.S.A. – w/cs. tt
11/23/81		DEPOSITION OF EDWIN YANCY, SR. taken in Raleigh, N.C. on 10/30/81.
		DEPOSITION OF J. D. DODSON taken in Raleigh, N.C. on 10/30/81.
		DEPOSITION OF J. D. DODSON, PART II
		DEPOSITION OF PHIL HASS taken in Raleigh, N.C., on 10/22/81. Not original.

DEPOSITION OF EDGAR J. BOONE taken in Raleigh, N.C., on 10/23/81.

DEPOSITION OF DONALD L. STORMER taken in Raleigh, N.C., on 10/23/81.

DEPOSITION OF THOMAS C. BLALOCK taken in Raleigh, N.C., on 10/23/81.

DEPOSITION OF LEONARD RALPH SASSER taken in Raleigh, N.C., on 10/30/81.

DEPOSITION OF MARTHA RUTH JOHNSON taken in Raleigh, N.C., on 10/29/81.

DEPOSITION OF DR. DANIEL GODFREY taken in Raleigh, N.C., on 10/22/81.

DEPOSITION OF ZACKIE W. HARRELL taken on 10/15/81.

DEPOSITION OF ZACKIE W. HARRELL, PART II, taken in Raleigh, N.C., on 10/29/81.

DEPOSITION OF TALMADGE BAKER in Raleigh, N.C., on 10/22/81.

DEPOSITION OF DEWEY GILBERT HARWOOD, JR. taken on 10/9/81.

DEPOSITION OF JOSEPHINE PATTERSON taken on 10/9/81.

DEPOSITION OF JOHN RICHARDSON taken on 10/15/81.

DEPOSITION OF GEORGE W. O'NEAL taken on 10/15/81.

DEPOSITION OF CLYDE D. PEEDIN, SR., taken on 10/15/81.

DEPOSITION OF ELIZABETH MELDAU taken in Raleigh, N.C., on 10/30/81.

DEPOSITION OF HUGH LUPTON LINER taken on 10/16/81.

DEPOSITION OF HUGH LUPTON LINER, VOL. II, taken in Raleigh, N.C., on 10/23/81.

DEPOSITION OF DR. PAUL DEW taken on 10/16/81. cgh

200 DEFTS' RESPONSE TO U.S.' MOTION TO COMPEL ANS. TO INTERR. & MOT. FOR DISCOVERY SANCTIONS—w/cs.

201(3b) MEMO. IN SUPPORT OF MOTIONS FOR SANCTIONS BY defts.—w/cs.

202 DEFTS MOTION FOR SANCTIONS AGAINST THE UNITED STATES, RULE 37, F.R.Civ.P.—w/cs & attachments. cgh

203 MOTION FOR SUBSTITUTION OF PARTIES by pltfs. to substitute spouses of deceased pltfs. Cy. to opposing counsel in courtroom. (Filed in Open Court) 204 MOTION TO AMEND by pltfs. in Re: to pltfs. that have just gotten "Right to Sue" letters. Cy. to opposing counsel in courtroom. (Filed in Open Court.) W/attachments.

205 AFFIDAVIT of Burton Craige re: the photocopying of Personnel Data cards. Cy. to opposing counsel in courtroom. (Filed in Open Court.)

206(3b) MEMORANDUM IN SUPPORT OF APPEAL by pltf.'s from Mag. Leonard's Order of 11/17/81. Cy. to opposing counsel in courtroom. (Filed in Open Court) cgh

Motion hearing & Pre-Trial conference held before J. Dupree in Raleigh, N.C. Cressie Thigpen, Ed Reibman, Squire Padgett & Burton Craige for pltfs.: Howard Manning, Sr., Howard Manning, Jr., & Millard Rich for the defts. All motions must be filed by 11/25/81 at 5:00 p.m. & responses filed by 5:00 p.m. on 11/27/81. Final P/T to be at 10:00 a.m. on 11/30/81. ETT: 12 weeks. cgh.

11/23/81 Received from Atty. Craige a packet of info. containing date on current USDA employees by educational degree & race—responding in part to Mag. Leonard's Order of 11/12/81. cgh

11/24/81 207(46) SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPEAL—pltfs. again request that they be permitted to copy said

personal data cards prior to trial or, in the alt. subpoena them for use at trial – w/cs. cy. J. Dupree tt

11/25/81 208 MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF DEFENDANT'S LIABILITY – by pltf.-intervenor U.S.A. – w/cs. tt

209(4b) MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF DEFENDANTS' LIABILITY – by pltf.-intervenor U.S.A. – w/cs. tt

11/27/81 210 MOTION FOR SUBSTITUTION OF PARTIES – Thelma Groves Turner for pltf. J.S. Turner, deceased – w/cs. cgh

211 DEFTS' RESPONSE TO THE U.S.'S MOTION FOR SUM. JUDG. ON THE ISSUE OF DEFTS' LIABILITY asking that it be denied – w/cs & affidavit of Thomas Carlton Blalock & Francis Giesbrecht. cgh

212 DEFTS' RESPONSE TO THE U.S. MOTION FOR SUM. JUDG. ON THE ISSUE OF DEFTS' COUNTERCLAIM AGAINST THE USDA & FOR INJUNCTIVE RELIEF – w/cs & attachments. cgh

213(4b) PLTF. – INTERVENORS MEMO. IN OPPOSITION TO DEFTS' MOTION FOR SANCTIONS – w/cs.

11/30/81 214 DEFTS' TRIAL MEMO. PUR. TO LOCAL RULE 26.04 EDNC – w/cs. cgh

215 DEFTS' PRE-TRIAL FINDING OF FACT & CONCLUSIONS OF LAW LOCAL RULE 26.07, EDNC – w/cs. cgh

Final P/T Conference held before J. Dupree in Raleigh, N.C. Edward D. Reibman, Cressie Thigpen, Jr., Squire Padgett & Burton Craige for pltfs.: Howard Manning, Sr. & Howard Manning, Jr. for defts. Pltfs' mot. to amend re: Title VII claims is allowed. Pltfs' mot. for substitution of parties is allowed. Mot. for sum. judg. on counterclaim is denied. Mot. for sum. judg. on defts' liabilities is denied. Defts' mot. for sanctions is denied. Mag. Leonard's ruling is affirmed. cgh

216 PLTFS' AMENDED COMPLAINT – pltfs. pray that defts. are enjoined from failing to provide services to minorities equal to those they provide to whites; maintaining segregated 4-H Clubs & Ext. Homemaker Clubs; providing services to 4-H Clubs, Ext. Homemaker Clubs, farmers, etc. on a segregated basis; & engaging in any discriminatory employment practice based on race or national origin. They ask for a

recruitment program, establishment of valid qualifications, hiring of minorities, promoting of minorities; providing monetary compensation to minorities for losses & backpay w/cs. cgh

217 MEMORANDUM OF PRE-TRIAL COMPLIANCE – w/exhibit list, witnesses, contentions, stipulations, ETT: 12 weeks. cgh

218 PLTF.-INTERVENORS' OBJECTIONS TO DEFTS' EXHIBITS No. 76, 175, 67(1)-(100). cgh

219 PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW by pltf.–intervenors'– w/cs. cgh

12/3/81 220 DEFTS' ANSWER TO PLTF'S AMENDED COMPLAINT – praying action be dismissed & costs taxed to pltfs. – w/cs. cgh

12/4/81 221 PLTF'S RESPONSE TO DEFTS' OBJECTIONS TO EXHIBITS – pltfs. request objections be denied – w/cs.

222 PLTF.-INTERVENORS' RESPONSE TO DEFTS' OBJECTIONS TO EXHIBITS – requesting objections be denied – w/cs. cgh

12/7/81 223 MOTION TO PRODUCE SOURCE DATE OF DEFTS' EXHIBITS 67(1)-(100)-w/affidavit of Doris M. Fuller. cgh

12/17/81 TRANSCRIPT of Non-jury trial, Mon., 12/7/81, before J. Dupree in Raleigh, N.C. Volume I, pages 1-191. cgh

12/21/81 TRANSCRIPT of Non-Jury Trial, Wed., 12/9/81, before J. Dupree in Raleigh, N.C., Volume III, pages 444-672. cgh

12/28/81 TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 12/8/81 – Vol. 2.

TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 12/10/81 – Vol. 4.

*12/29/81 TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 12/14/81 – Vol. 5.

1/4/82 TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 12/15/81 – Vol. 6.

TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 12/16/81 – Vol. 7.

TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 12/17/81 – Vol. 8.

TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Fri. 12/18/81 – Vol. 9.

TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 12/21/81 – Vol. 10.

1/7/82 TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 12/22/81 – Vol. 11.

		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 12/23/81 – Vol. 12.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 12/28/81 – Vol. 13.
1/11/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 12/29/81 – Vol. 14.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 12/30/81 – Vol. 15.
1/12/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 1/5/82 – Vol. 17.
1/13/82	224	ORDER – all portions of transcript ordered by & delivered to the parties during the course of the trial within 10 days from the date taken or ordered, the charge shall be $4.00/page, which amt. may be divided equally between the U.S. & defts. (CIV O.B. #64, p. 141) (DUPREE, J.) CC to counsel. cgh
1/19/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 1/4/82 – Vol. 16.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 1/6/82 – Vol. 18.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 1/7/82 – Vol. 19.

		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Fri., 1/8/82 – Vol. 20.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 1/11/82 – Vol. 21.
1/22/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 1/12/82 – Vol. 22
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 1/13/82 – Vol. 23.
1/26/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 1/19/82 – Vol. 24.
1/27/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 1/20/82 – Vol. 25.
*12/28/81	225	DEFTS' MOT. TO DISMISS CLAIMS OF CERTAIN INDIVIDUAL PLTFS. PUR. TO RULE 41(b) & RULE 37(b) – w/cs. (Filed in Open Court) cgh
1/29/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 1/21/82 – Vol. 26.
2/1/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Fri., 1/22/82 – Vol. 27.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 1/15/82 – Vol. 28.

2/2/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 1/26/82 – Vol. 29.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 1/27/82 – Vol. 30.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 1/28/82 – Vol. 31.
		Non-Jury Trial began on Mon. Dec. 12, 1981, before J. Dupree in Raleigh, N.C. Ed Reibman, Cressie Thigpen, Squire Padgett, & Burton Craige for the pltfs. Howard Manning, Sr. Howard Manning, Jr., Millard Rich, Jr. for the defts. 31 days for the trial. Final arguments to be heard on *2/12/82, at 10:00 a.m.* before J. Dupree. cgh

..... FILE #5 .....

2/8/82	226	DEFTS' MOTION TO DISMISS CLAIMS OF CERTAIN INDIVIDUAL PLTFS. PUR TO R. 41(b) & R. 37(b) – w/cs.
	227	DEFTS' PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW – w/cs.
2/8/82	228	DEFENDANTS' POST TRIAL MEMORANDUM – w/cs.
	229	PLAINTIFFS MEMORANDUM & PROPOSED CONCLUSIONS OF LAW & FACT – w/cs.

	230	POST TRIAL FINDINGS OF FACT, CONCLUSIONS OF LAW & PROPOSED DECREE OF UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR – w/cs.
2/11/82	231	PLAINTIFFS' RESPONSE TO DEFENDANTS' PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW – w/cs.
	232	DEFTS' PROPOSED FINDINGS OF FACT MARKED IN ACCORDANCE W/J. DUPREE'S INSTRUCTIONS w/cs – by Pltf. – intervenor.
File #6		File #5 to J. Dupree. Red folder. cgh
	233	MOTION FOR PRELIMINARY INJUNCTION by pltf. as to the filling of county ext. head in Hertford Co. – w/attachments & cs. cgh
2/19/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Fri., 2/12/82 – Vol. 32.
	234	APPENDICES TO PROPOSED DECREE, FILED ON FEB. 9, 1982 – w/cs & attachments.
	235	ERRATA LIST TO U.S.' PROPOSED FINDINGS OF FACT, FILED ON FEB. 9, 1982 & TO U.S.' MARKED COPY OF DEFTS' PROPOSED FINDINGS OF FACT, FILED ON 2/11/82 – w/cs.

	236	REPLY BRIEF to defts' asking to discard the expert's witness, Dr. Charles Mann, statistical records – w/cs. Cys. of entries 234, 235 & 236 to J. Dupree. cgh
3/2/82	237	DEFTS' RESPONSE TO PLTFS' MOT. FOR PRELIMINARY INJUNCTION – pltfs' mot. for prel. injunc. as to Hertford Co. should be denied – w/cs. cgh
3/5/82	238	MOTION FOR PRELIMINARY INJUNCTION by pltf. in re: to vacant position of Co. Ext. Chairman in Warren Co. – w/cs & attachment. cgh
3/26/82	239	DEFTS' RESPONSE TO PLTFS' MOTION FOR PRELIMINARY INJUNCTION asking for denial – w/cs & exhibit A, B & C. cgh
8/20/82	240	ORDER SUBSTITUTING PARTIES – Elizabeth Ivey, Administratrix of the Estate of D. O. Ivey, deceased; Eva L. Greene, Administratix of the Estate of Cleo Rich Greene; & Thelma Graves Turner, Administratix of the Estate of J. A. Turner, are substituted as parties pltf. of the deceased pltfs. – (DUPREE, J.) (CIV O.B. #66, p. 195) cc counsel tt
	241	MEMORANDUM OF DECISION (CLASS-WIDE CLAIMS) – Court finds that while there was

ample evidence of disparate treatment of blacks by the Extension Service prior to enactment of the Civil Rights Act of 1964, since that time deft. has made conscientious & successful efforts to erradicate the effects of past discrimination, has at no time engaged in purposeful discrimination & pltfs. have fallen short of establishing a preponderance of the evidence that deft. has engaged in a pattern & practice of discrimination; order will enter dismissing the pattern & practice suit of the U.S. as pltf.-intervenor; the claims of the 45 individual pltfs. will be the subject of a separate memo. of decision & order – (DUPREE, J.) (CIV O.B. 66, p. 196) cc counsel tt

	242	ORDER DISMISSING COUNTERCLAIM – USDA's mot. for sum. judg. on the counterclaim of the Extension Service is denied – (DUPREE, J.) (CIV O.B. #66, p. 197) cc counsel tt
	243	ORDER OF DISMISSAL AS TO CERTAIN INDIVIDUAL CLAIMS – mot. of defts. to dismiss the individual claims of Henry Revell, Chester Stocks, E. C. Short, Calvin Hargrove, Robert Lee Lancaster, Clifton Parker, Dorothy M. Hearne,

Louise Penn Slade, Alma Hobbes, Inez Foster, George Koonce, Lloyd Peace, Marilyn Rich White, Mary Crawford, Elizabeth Ivey (Admin. of Estate of D. O. Ivey) & Essie Moore is allowed & the action as it relates to these named pltfs. is dismissed w/prejudice – (DUPREE, J.) (CIV O.B. #66, p. 198) cc counsel tt

8/20/82 244 JUDGMENT ON CLASS-WIDE CLAIMS – U.S. as pltf.-intervenor is not entitled to recover of the defts., or any of them, by reason of any matters alleged in the original complaint in intervention or the amend. complaint in intervention & that the action of the pltf.-intervenor be & is dismissed w/costs – (DUPREE, J.) (CIV O.B. #66, p. 199) cc counsel tt

245 ORDER DISMISSING ACTION AS TO INDIANS – insofar as the action undertakes to assert a cause of action on behalf of Indians, the same is dismissed – (DUPREE, J.) (CIV O.B. #66, p. 200) cc counsel tt

246 ORDER OVERRULING MOTION FOR PRELIMINARY INJUNCTION – mot. of pltfs. for a preliminary injunction filed 2/11/82 w/respect to the co. extension chairmanship in

Hertford Co., N.C. is overruled & dismissed as moot – (DUPREE, J.) (CIV O.B. #66, p. 201) cc counsel tt

247 ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION – WARREN COUNTY – pltfs.' mot. for preliminary injunction filed 3/5/82 w/re to vacant position of co. ext. chairman in Warren Co. is denied but w/out prejudice to such rights as George Koonce may have, or claim to have, w/respect to the failure of defts. to recommend him for appointment as co. ext. chairman to fill vacancy created by retirement of L. C. Cooper – (DUPREE, J.) (CIV O.B. #66, p. 202) cc counsel tt

9/14/82 248 NOTICE OF APPEAL – by pltfs. W/CS. Filed copy to counsel, Judge Dupree, Court of Appeals including CC of index, transmittal letter. Copy of order appealed from to Court of Appeals. keb

9/17/82 249 MEMORANDUM OF DECISION (INDIVIDUAL CLAIMS) – judg. to be entered dismissing the individual claims as the Ext. Service endeavored to comply with the law. (DUPREE, J.) (CIV O.B. #67, p. 34) CC to counsel. cgw

	250	JUDGMENT – this action is dismissed as to all individual pltfs. Each side will bear its own costs. (CIV O.B. #67, p. 35) (DUPREE, J.) (ENT. 9/17/82) CC to counsel.
9/29/82	251	NOTICE OF APPEAL – each of the above named plaintiffs appeal to the U.S. Court of Appeals for the Fourth Circuit from the Judgment and Memorandum of Decision (Individual Claims) entered in this action on the 17th day of September, 1982. W/CS. Filed copy to Counsel, Judge Dupree and Court of appeals with CC of index and transmittal letter. keb
10/7/82	252	DESIGNATION OF RECORD ON APPEAL – by defendants. W/CS. keb
10/19/82	253	DEFENDANTS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES – by defts. W/CS. keb
	254	AFFIDAVIT OF HOWARD MANNING, Sr. in support of defts. W/CS. keb
	255(4b)	MEMORANDUM IN SUPPORT OF MOTION FOR AND AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES – by defts. W/CS. keb
10/19/82	256	NOTICE OF APPEAL – by U.S.A., plaintiff intervenor.

		W/CS. Filed copy to the Court of Appeals with transmittal letter and CC of Index. Copies to counsel. (entered 10/21/82) keb
10/20/82	257	DESIGNATION OF RECORD – by Edward Reibman, atty for pltfs. W/CS. keb
10/27/82	258	DESIGNATION OF RECORD – by USA W/CS. keb
11/8/82		Mailed record on appeal to the U.S. Court of Appeals including Volumes I thru XVII – pleadings, XVIII and XIX – memoranda, XXXIV thru XLIII – transcripts, with cc of index and transmittal letter. Copies to counsel. Volumes XX thru XXXIII (exhibits) to be forwarded by counsel. keb
11/8/82	259	MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR AND AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES – by USA. W/CS. keb
11/15/82	260	NOTICE OF APPEAL – by USA from the September 17, 1982 order. Filed copies to counsel, Judge Dupree, and 4th Circuit with transmittal letter.
12/2/82	261	PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR AN AWARD OF ATTORNEY FEES, COSTS, AND EXPENSES – by pltfs. W/CS. keb

12/8/82	262	ORDER – the ruling on defendant's motion for attorneys' fees, costs and expenses will be stayed pending plaintiffs' appeal to the Fourth Circuit Court of Appeals. (Dupree) CIV OB #68, pg. 8. CC to counsel.
4/29/85	263	PUBLISHED OPINION OF THE FOURTH CIRCUIT – Affirming the decision of the dist. ct. CC to Judge Dupree. jrj
	264	JUDGMENT OF THE COURT OF APPEALS – AFFIRMED. CC to Judge Dupree. jrj
	265	BILL OF COSTS – costs are taxed by the Clerk of the US Court of Appeals for the Fourth Circuit in the amount of 225.00 CC to Judge Dupree. jrj
		Case file to Judge Dupree for ruling on motion for attorneys fees, costs and expenses. Record in Room 630. jrj
5/14/85	266	ORDER – that the defts. motion for attorneys' fees is DENIED and defts. motion for costs on appeal is ALLOWED. (DUPREE) CIV OB #78, p. 171. CC to parties. jrj

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

CIVIL NO. 2879

P. E. BAZEMORE, ET AL., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, ET AL.,
PLAINTIFF-INTERVENORS

vs.

WILLIAM C. FRIDAY, AS PRESIDENT
OF THE UNIVERSITY OF NORTH CAROLINA, ET AL.,
DEFENDANTS

MEMORANDUM OF DECISION AND ORDER

CIV. O.B. #54, P. 41

Various black employees and service recipients of the North Carolina Agricultural Extension Service (NCAES) brought this action on November 18, 1971 pursuant to 42 U.S.C. §§ 1981, 1983 and 2000d (Title VI of the Civil Rights Act of 1964) against multiple government officials alleging racial segregation and discrimination in employment practices and delivery of services by the NCAES. Plaintiffs generally contend that (1) black NCAES employees receive lesser pay and positions on account of their race; (2) NCAES services are segregated and blacks receive inferior service from the NCAES; (3) the NCAES maintains racially segregated Homemaker Extension Clubs and 4-H Clubs.

The defendants are the United States Secretary of Agriculture; the Administrator of the Federal Extension Service; the president of the Consolidated University of North Carolina (UNC); the Chancellor of North Carolina State University (NCSU); the Director of NCAES; the Board of Governors of UNC; UNC; and three county commissioners. All individual defendants are sued in their official capacities.

On April 7, 1972, the United States intervened as a party-plaintiff. The defendants thereafter filed a third-party complaint against the Secretary of Agriculture and Administrator of the Federal Extension Service in their official and individual capacities. The court realigned the third-party defendants, however, as plaintiff-intervenors on July 21, 1972. The parties engaged in extensive discovery until the completion date on March 23, 1973. Since then, the court has conducted two pre-trial conferences, one as recently as December 29, 1978. Currently pending are five matters awaiting decision: (1) plaintiffs' motion to certify proposed plaintiff and defendant classes; (2) plaintiff United States' motion to amend the intervention complaint to include allegations of racial and sexual discrimination in violation of Title VII (42 U.S.C. § 2000e, *et seq.;* (3) question of whether the Eleventh Amendment bars recovery of back pay; (4) the Secretary of Agriculture's motion to dismiss defendants' counterclaim (formerly designated as third-party complaint prior to realignment); and (5) plaintiffs' motion to reopen discovery.

CLASS CERTIFICATION

A. *Proposed Plaintiff Classes.*

Plaintiffs first seek to certify four subclasses consisting of black and Indian NCAES service recipients and members of Extension Homemaker and 4-H Clubs, pur-

suant to F.R.Civ.P. 23(b)(2).[1] Plaintiffs contend that only black agents are assigned to render services to black NCAES recipients and that the Extension Homemaker and 4-H Clubs are racially segregated in contravention of the Fourteenth Amendment and Title VI.

Rule 23(b)(2) was tailored to remedy this type of alleged discrimination, for civil rights actions are by their nature amenable to class relief. Black plantiffs have, therefore, often represented fellow blacks who receive services on a segregated basis. *E.g., Bailey v. Patterson,* 369 U.S. 31, 32-33 (1962), *cited in East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 403 (1977); *Nesmith v. Young Men's Christian Association of Raleigh, N.C.,* 273 F. Supp. 502 (E.D.N.C. 1967), *reversed on other grounds,* 397 F.2d 96 (4th Cir. 1968). Discrimination cases do not, however, qualify as class actions per se. The burden is upon the moving plaintiffs to prove the requirements of Rule 23 are met. Plaintiffs do not carry their burden merely because of their race or request for class relief. *Doctor v. Seaboard Coast Line Railroad Company,* 540 F.2d 699 (4th Cir. 1976). Nor do they carry the burden by filing "boilerplate memoranda laden with self-serving conclusions." *Shelton v. Pargo, Inc.,* 582 F.2d 1298, 1312-13 (4th Cir. 1978). Rather, the moving party must come forward with facts obtained in extensive discovery showing the necessity for class relief. *Id.; see* Shawe, *Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance With Federal Rule of Civil Procedure 23(a),* 19 Wm. & Mary L.Rev. 469, 516-17 (1978).

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[1] "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * * *

"(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;"

The parties have engaged in extensive discovery in this case; but the only factual basis brought forward by the plaintiffs in support of class certification is their unverified complaint. Plaintiffs have pointed to no facts within the record built by discovery showing the prerequisites of Rule 23 have been met.[2] Plaintiffs have therefore failed to meet the burden imposed upon them to show the need for class certification of NCAES service recipients, and the motion for class certification of the putative subclasses is therefore denied.

Plaintiffs also seek class certification of all NCAES black and Indian employees since November 18, 1971. Certification of this class must be denied for the same reasons enunciated above. However, certification of this putative class would remain unlikely even if plaintiffs were able to make a substantial factual showing, for the courts have tightened Rule 23 standards in employment discrimination cases. *Shawe, supra.* A brief description of the NCAES program reveals the rationale for the increased restrictions.

The NCAES was established as a part of NCSU by federal and state legislation for the specific purpose of extending the University's educational service to North Carolina farm families on subjects relating to agriculture, home economics, and youth, as well as community and natural resource development. The Service is the principal means by which the University's research findings and the subjects are communicated to the people.

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[2] Plaintiffs' counsel represented to the court during the pre-trial conference held December 29, 1978 that they would come forward with information gained from discovery, summarize it, and submit it in support of their class certification motion (see Tr. pp. 45-46). The court never received this information.

The Service operates as a partnership between three levels of government - federal, state and county. These levels are officially represented by the United States Department of Agriculture (USDA), NCSU, and the county boards of commissioners. The Service operates in each of North Carolina's one hundred counties, with a small percentage of its employees located in the Raleigh headquarters. By this arrangement, county extension agents are joint employees of NCSU and the counties in which they work. They are also official representatives of the USDA.

The NCAES provides a share of the salaries for the county personnel. The salaries are determined jointly by the Service and the county board of commissioners. The NCAES sets the minimum requirements and qualifications for employment and receives and examines applications. It recommends qualified applicants to the county commissioners. The Service accepts responsibility for the administration and supervision of the extension programs and provides a staff of specialists to continuously train the agents in the current technology. In return, each county provides a share of the salaries as well as office space and equipment, etc.

The counties confer with the Service on all personnel action and proposed programs so that they may be tailored to the special needs of the particular counties. Indeed, North Carolina counties vary widely in size, population, topography and agrarian needs. Thus, the labor market available to each county widely differs according to geographic perferences and particular skills needed. Moreover, the racial composition of each county varies. For instance, blacks constitute a majority in some of the eastern tobacco counties, while blacks are a rarity in some of the western regions.

One must conclude, therefore, that "across-the-board" employment discrimination by the NCAES in each of the one hundred counties could not be done in a manner so

that each victim's claim would be guaranteed to be "typical" of the other claims within the class, as required by Rule 23(a). The Supreme Court requires that the district court must assure itself that the class representatives are in fact members of the class they purport to represent. Because the manner of employment discrimination widely varies according to different work facilities, available personnel and managerial needs, the burden of proving that the class representatives are in fact members of a broad class in "across-the-board" employment discrimination cases is difficult. Moreover, the Fourth Circuit requires in employment discrimination cases that all the plaintiff representatives and all the class members must be from the same work facility within an employer's network of multiple work locations and in the same type of employ, *Hill v. Western Electric Company, Inc.*, 596 F.2d 99, 102 (4th Cir. 1979), particularly when the multiple work facilities draw from different labor markets and have different types of work positions. *Patterson v. American Tobacco Company*, 535 F.2d 257 (4th Cir. 1976). A representative plaintiff cannot represent workers within the same facility who hold a different type of job or employees in different facilities with the same kind of job. *Hill*, 596 F.2d at 102.

In the instant case, black and Indian NCAES employees are scattered over the state, holding different jobs and specialities according to the needs of the particular counties in which they work The representative plaintiffs of the putative class come from roughly thirty of the one hundred counties: In no sense can they be deemed to work within the same facility or hold the same job or position as each of the other black and Indian NCAES employees in the remaining seventy counties. Accordingly, the individual plaintiffs cannot be deemed to be members of the class which they purport to represent. *Rodriguez, supra.* Class certification of the plaintiff employee class is therefore denied.

B. *Defendant Class.*

Plaintiffs have also moved to certify as a class all county commissioners of North Carolina's 100 counties. The motion is meritorious at first blush, for any judicial decree imposed upon the NCAES would directly affect the governing bodies of each of the counties. The county commissioners work closely with NCAES officials, and any restraint upon the NCAES would necessarily restrain the commissioners. Nevertheless, the plaintiffs cannot maintain an action against all the county commissioners for lack of standing to sue. No Article III "case or controversy" exists when a representative plaintiff has not suffered an "injury in fact" imposed by *each member* of the putative defendant class. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684 (E.D. Pa. 1973).[3] Here, the prerequisites of Rule 23 are likely met; nevertheless, the plaintiffs cannot bootstrap themselves into standing they lack under the Constitution merely because they fulfill the requirements of the federal rules. *Weiner*, 358 F. Supp. at 694, citing 28 U.S.C. § 2072 (Rules Enabling Act); Comment, *Jurisdical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship of Standing and Typicality*, 58 Boston Univ.L.Rev. 492, 497 (1978). Because not all of the plaintiffs have dealt with every county commissioner in North Carolina, they cannot establish direct injury caused by each defendant class member. Accordingly, plaintiffs' motion to certify the defendant class is denied for lack of subject matter jurisdiction.

MOTION TO AMEND INTERVENTION COMPLAINT

The United States moved on February 28, 1975 to amend its intervention complaint to include allegations of

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[3] The requirement that each representative plaintiff must be injured by each member of the defendant class is not eased if a plaintiff class if certified. *O'Shea, supra.*

racial and sexual discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq*. The defendants strenuously object to the motion, citing delay and the burden that would be placed upon the defendant should the amendment be allowed.

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given if justice so requires." Whether justice requires leave to amend depends, however, upon a balancing of the factors enunciated in *Foman v. Davis*, 371 U.S. 178, 182 (1962): (1) whether an amendment would unduly delay the litigation; (2) whether the motion is made in good faith; (3) whether the nonmovant would be unduly prejudiced by allowance of the amendment; and (4) whether the amendment on its face would fail to be of benefit to the movant's case.

First, a substantial probability exists that the litigation would be unduly delayed should the United States' proposed amended complaint be allowed in its entirety. An inquiry into whether the defendants have engaged in sexual discrimination in violation of Title VII would introduce a new lawsuit into this already prolonged litigation. Insofar as the amended complaint alleges racial discrimination, however, a delay would not likely be caused. The parties have already engaged in substantial discovery and fact investigations, the fruits of which can be used to prove violations of Title VII as well as Title VI and 42 U.S.C. §§ 1981 and 1983. Moreover, the case has not been calendered for trial.

Nevertheless, the case is one of the oldest on the Eastern District's docket. Two pre-trial conferences have been held as well as a lengthy motion hearing. Should the amendment concerning sexual discrimination be allowed, the court's efforts to adjudicate the thousands of other cases awaiting ruling in this one-judge district would be further frustrated.

Secondly, the record does not reveal that the delayed motion has been made with any malevolent purpose. It was settled only recently that the United States could bring Title VII actions against governmental entities. Still, the United States delayed three years after Congressional authorization to bring Title VII suits and two years after the close of discovery in bringing this motion. Defendants' counsel were not apprised of the plaintiffs' concerns with sexual discrimination until one month before the motion was filed.

Thirdly, the amendment manifestly would aid the plaintiffs' case due to the more lenient standard of proof and the availability of money damages against the state in Title VII actions. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Fourth, the likelihood of undue prejudice to the defendants is high should the amendment be allowed. The issues have been joined in this action for roughly nine years; the parties have expended considerable time, effort and money. Should allegations of sexual discrimination be allowed, defendants would be forced to incur increased costs and attorney fees while their counsel would be engaging in further protracted discovery and investigation into discrimination in the NCAES based upon sex. On the other hand, little additional effort would be required in order to shed light on racial discrimination as applied to Title VII.

The court concludes upon balancing these facts that the amendment should be allowed, but only insofar as it alleges racial discrimination. Insofar as the amended complaint alleges sexual discrimination, however, the motion to amend is denied. The court's ruling strikes a balance between protecting the rights of the original plaintiffs under all the applicable statutes and the court's responsibility to insure continuous and expedited flow of its docket.

RECOVERY OF BACK PAY

The court raised *sua sponte* the issue of whether plaintiffs' prayer for back pay was barred in all instances by the Eleventh Amendment. The parties have submitted scholarly briefs on this issue and the court has been aided by decisions that have come down since that time.

The court must first address the preliminary question of whether any of the defendants are the "state" as contemplated by the Eleventh Amendment.

William C. Friday, President of Consolidated University, John T. Caldwell, Chancellor of NCSU, and George Hyatt, Jr., Director of NCAES, are all sued in their official capacities. The UNC Board of Governors and UNC itself are sued as separate entities. Plaintiffs contend that the Eleventh Amendment prohibition does not apply to these defendants for they cannot be deemed officers or agencies of the State of North Carolina. Plaintiffs note that UNC and its Board of Governors are separate corporate bodies politic, capable of suing and being sued, and are able to issue corporate bonds without liability by the state. Nevertheless, the Board of Governors develops and presents to the General Assembly on behalf of UNC a single, unified *recommended* budget. N.C.G.S. § 116-11(9)a(11). The recommended budget includes provisions for salaries, which presumably encompasses back pay. Therefore, should the court award the plaintiffs back pay, the funds available for satisfying the judgment must necessarily come from the state treasury. UNC, its Board of Governors and officers must be deemed to be agencies of the State of North Carolina. *Thonen v. Jenkins,* 517 F.2d 3 (4th Cir. 1975).[4]

Assuming the defendants are agencies or agents of the state, the court must address the issue of whether the Eleventh Amendment bars recovery of back pay in lawsuits under the statutes asserted by the plaintiffs.

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[4] The plaintiffs in *Thonen* brought their action in 1971 after passage of Chapter 116 of the North Carolina General Statutes.

1. *42 U.S.C. § 1981.* Back pay is not recoverable against the state or state agencies under 42 U.S.C. § 1981, but is recoverable against counties and their officers. *Wade v. Mississippi Cooperative Extension Service,* 424 F. Supp. 1242 (N.D. Miss. 1976), *on remand,* 528 F.2d 508 (5th Cir. 1976).

2. *42 U.S.C. § 1983.* Back pay is not recoverable against the state, its agencies or its officers in their official capacities. *Edelman v. Jordan,* 415 U.S. 651, 675-77 (1974).

3. *Title VI.* Back pay is not recoverable under 42 U.S.C. § 2000d. *Gilliam v. City of Omaha,* 388 F. Supp. 842, 847 (D. Neb. 1975), *citing Edelman, supra, aff'd on other grounds,* 524 F.2d. 1013 (8th Cir. 1975).

4. *Title VII.* Back pay is recoverable from the state treasury in Title VII actions, notwithstanding the Eleventh Amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976).

5. North Carolina counties and their officers in their official capacities do not enjoy the protections of the Eleventh Amendment. *Atkins v. City of Charlotte,* 296 F. Supp. 1068 (W.D.N.C. 1969); *see Edelman, supra.*

UNITED STATES' MOTION TO DISMISS COUNTERCLAIM

Defendants asserted in their third-party complaint filed April 21, 1972 that the third-party defendants (Secretary of USDA and Administrator of the Federal Extension Service) are ultimately liable for any monetary award assessed against the defendants and that the third-party defendants have applied various statutes and regulations to the defendants in a manner violating the equal protection clause of the Fourteenth Amendment. The third-party defendants filed a motion to dismiss the third-party complaint on June 22, 1972. The court afterward realigned the third-party defendants as plaintiffs on July 21, 1972. The court specified in the realignment order that "[a]ll claims and requests for relief set forth in the Third-Party Complaint are hereby preserved as . . . counterclaims." The United States' motion to dismiss the third-party complaint, is now treated as a motion to dismiss the counterclaim.

1. Plaintiffs first pose a series of objections in their motion to dismiss dealing with defendants' compliance with Rule 14, F.R.Civ.P. - impleader (third-party practice). Because the court now treats the third-party complaint as a counterclaim, however, plaintiffs' objections regarding compliance with Rule 14 are irrelevant.

2. Defendants allege in their counterclaim that applicable federal statutes and regulations merely require non-discrimination and do not compel affirmative-action responses to a past history of racial discrimination. Defendants contend, however, the plaintiffs are imposing an affirmative action program upon the defendants and not upon any other state agency in the country. This practice, defendants argue, violates the equal protection clause. Plaintiffs state in their motion to dismiss that a letter from the EEOC office to the Director of NCAES shows that defendants' allegations are erroneous in that the plaintiffs have merely required the defendants to take actions approved by courts in other contexts.

Plaintiffs' argument is without merit for several reasons. First, the plaintiffs' motion to dismiss the counterclaim pursuant to Rule 12(b)(6) merely tests the sufficiency of the allegations within the counterclaim, without reference to facts appearing outside of the pleadings. The court cannot, therefore, consider the contents of the EEOC letter to the defendants without treating the motion as one for summary judgment under Rule 56, and then only after appropriate notice to the defendants. No notice has been given to the defendants that the plaintiffs are treating the motion as one for summary judgment. Secondly, a review of the letter indicates that the plaintiffs seek to impose a quota system on the defendants in that the plaintiffs have required that fifty per cent of all position vacancies are to be filled with minority groups until the racial composition of the NCAES reflects the racial composition in the community. Thirdly, plaintiffs' argument that the affirmative action plan merely tracks a

program approved by a court in another context does not address defendants' allegations that the plan is imposed in contravention of the equal protection clause.

Accordingly, plaintiffs' motion to dismiss the counterclaim is denied.

PLAINTIFFS' MOTION TO REOPEN DISCOVERY

The plaintiffs move to reopen discovery on the basis that the racial composition for the NCAES and various employment practices may have changed over the years since the close of discovery. The defendants object only on the basis that the proper scope of discovery cannot be ascertained until the court has ruled on the class certification motions, the motion to amend the original complaint to include Title VII, the back pay issue, and the motion to dismiss the counterclaim. Since the court has now ruled upon all outstanding matters, the permissible scope of discovery is clearer. Moreover, the court could benefit from a factual appraisal of the current racial balance and employment practices within the NCAES. The data would directly affect the need, mode and scope of any judicial decree that may be rendered in the case. The parties are allowed to and including February 1, 1980 within which to complete discovery.

SO ORDERED.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

OCTOBER 9, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

CIVIL NO. 2879

P. E. BAZEMORE, ET AL., PLAINTIFFS

vs.

WILLIAM C. FRIDAY, ET AL.,
DEFENDANTS

ORDER

This action came before the court for hearing on various pending motions on July 17, 1981, and it is on the basis of the arguments of counsel and the memoranda of record that the court makes the following rulings.

On November 5, 1979, plaintiffs moved the court to reconsider its order of October 9, 1979 which denied the motion for certification of a plaintiff and defendant class under Rule 23 of the Federal Rules of Civil Procedure. After careful review of the additional filings in support of plaintiffs' motion to reconsider and consideration of the arguments presented, the court concludes that the decision to deny class certification was correct and in accordance with the law in this circuit. *See Hill v. Western Electric Company, Inc.*, 596 F.2d 99 (4th Cir. 1979); *see also Abron v. Black & Decker, Inc.*,__F.2d.__, No. 79-1871 (4th Cir., decided July 17, 1981). Accordingly, the motion to reconsider and certify a class is denied for the reasons set forth in the court's order of October 9, 1979.

Good cause having been shown, the motion of plaintiff-intervenors to set aside the default entered against them on November 6, 1979, is allowed. Rule 55(c), F.R.Civ.P.

The defendants' motion for a protective order, filed on January 8, 1980, is denied. However, the court would encourage the parties to mutually agree to reasonable limitations on the scope of discovery in order to expedite the disposition of this case.

Although it appears to the court that the discovery sought by defendants' motion to compel, filed February 14, 1980, has been or is being provided by plaintiffs, the motion is allowed and plaintiffs are directed to continue their efforts to complete their answers to defendants' interrogatories.

SO ORDERED.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

JULY 29, 1981.

TRIAL TESTIMONY OF THOMAS BLALOCK (EXCERPTS)

[3811] * * * * *

Q. Dr. Blalock, there has been some testimony here with respect to a decision in connection with the 4-H and Homemakers Clubs in the so-called reasonable action or reasonable effort. Do you recall that testimony when Dr. Harwood was testifying? It involved an inquiry into the cost of reasonable effort programs?

A. Oh, yes; I do. Yes.

Q. Are you familiar with that situation?

A. Yes.

Q. And the incidents that transpired at that time?

A. Yes. I recall that.

Q. If you would, would you relate to the court your recollection of the problems?

A. The situation that led to that particular discussion related to the 1974 Civil Rights initiative. All reasonable effort, as has been defined by the Department of Agriculture, in terms of organizing and maintaining clubs in biracial communities at one time involved knocking on doors and getting a signed affirmation from individuals—either youth or adults in that community—that they had been contacted and did not wish to participate.

They later modified that to simply include that you had to knock on doors and invite people to [3812] participate. We were debating at that time whether we ought to take that step in North Carolina as one further step of trying to comply.

At that time, Dr. Stormer was on our staff and had been in Texas at the time the Texas Extension Service had implemented the Affirmative Action Program in Texas that included the all reasonable effort. That did include the knocking on doors in individual communities.

And Dr. Stormer estimated for us the magnitude of the expense in taking that one step in all reasonable effort. It was my judgment, and based on conversations with Dr.

Stormer and other state people who had been through that, that in terms of what this achieves in relation to the cost, it is not very great; that it is not a very cost-effective step.

And so I had concluded that we would not take that step because of the limited resources we had. At that time we were dealing with some rather tough budget problems. That did not seem to me to be the highest priority use of staff resources to have them knocking on individual doors checking with individual youngsters or adults in that community.

And so we made an inquiry to your office as to the impact of this and what we ought to do on the suit. But I had already made the decision that I was not going [3813]to do that, regardless of what your advice was, because of the cost. I did not feel it was a cost-effective thing.

The Court: Were you trying to get him to knock on doors, and he wouldn't do it?

The Witness: No, sir; he did not, fortunately. But I had made the decision before his response came back.

By Mr. Manning, Sr.:

Q. As a manner of fact, the cost factor had been brought out in a meeting which I attended two years before; Had it not?

A. Yes; It had. Yes.

Q. And that was what was discussed?

A. Yes.

The Court: You say even if he had recommended it—

The Witness: (Interposing) He had said—I did not ask him whether we should do this or not. I asked him the impact of this. If we did something of this sort, is this going to incriminate us? Is this going to give us problems if we go into court?

And we have kept a dialogue with him of trying to not inadvertently stumble into something that we didn't intend to do. So I did not ask him. I made up my [3814] mind that even if he said, "I see no problem as an impact on your suit," I was not going to take that step at this time.

[3907] * * * * *

Q. Dr. Blalock, based upon your attendance at that meeting, did it cause you to raise questions related to the salaries of black employees and female employees in the North Carolina Extension Service?

A. Of black and female employees?

Q. Yes.

A. Yes. The EEO Program deals specifically with those two categories of employees, and so that would have been our concern.

Q. All right. And that memoranda specifically indicates that black males and females were your concern—or women were your concern; is that not true?

A. I would have to reread the memorandum to be sure of that. It's been a long time. May I?

Q. Yes.

[3908] (Witness peruses document.)

A. Yes. My notes would indicate that I concluded that we had a concern in this area and indicated the reasons why differences in salaries existed. The competitive market being one of the factors—that there was a competitive market for—

Q. (Interposing) Not to interrupt you, but what paragraph are you reading from?

A. I'm reading from item eight on the third page.

Q. Would you read the entire item, please?

A. Yes.

". . . Believe you'd agree our salaries for women and nonwhite men on average are lower—our figures would verify—due to several factors."

The first point:

". . . The competitive market. This is not acceptable as a reason though."

And I do not agree with that.

Q. Even though you wrote it?

A. I do not agree with the fact that it is not accepted.

Q. But that was your view at the time?

A. That the competitive market is a factor in [3909] causing differences in salaries; Yes.

Q. But you said it is not an acceptable reason?

A. They had indicated in Washington that that was not an acceptable reason.

The Court: It would be helpful if you would explain to me the circumstances. What did this memorandum embody? Did it purport to show what you thought about something, or were you reporting on some meeting you attended, or just what was it?

The Witness: I was reporting on a meeting I attended, the information I had gained out of that meeting, what it appeared we were going to have to do in the future, and some needs that I felt we had to—some areas that we needed to do something about in North Carolina.

The Court: I think his question is, when you write saying "This is not acceptable as a reason though," Did you mean it was not acceptable to the authorities who were in charge of implementing the EEO Act or not acceptable as a reason to you personally?

That was your question?

Mr. Padgett: Yes.

The Witness: That was my—that's what—and remember these are notes. This is not a published presentation, but something that I used to speak from. [3910] The statement was intended to convey that the officials in Washington did not accept the competitive market as a justification for any differences in salaries that might exist. My explanation was that I do not agree with that conclusion because it is an economic reality that we deal with every day and only seem to have problems when it deals with either race or sex of accepting that it isn't a factor.

The second point under there is "tradition." Again, that salaries for women and blacks traditionally have been lower; and third, that it was "less county support for nonwhite positions," which again was a traditional thing.

By Mr. Padgett:

Q. When you were talking about tradition, you were talking about in the State of North Carolina at that time?

A. No, sir, I was talking about nationally.

Q. That would include the State of North Carolina?

A. Of course.

Q. Directing your attention further in your memoranda to paragraph 17 and 18–

A. (Interposing) Yes.

Q. –Have you had an opportunity to review paragraphs 17 and 18?

[3911] A. Yes; I have.

Q. Would you read paragraph 17, please?

A. Paragraph 17 says:

". . . majority are $500-$700 range. County should probably do $300-$400 also–for total of $800-$1,100."

Q. Was that your calculation as to the average difference in salaries of black males and females, or women?

A. This was a figure that I had concluded that we ought to do to make the adjustments in salaries that we needed to make at that time in response to the changing salary structures of our entry level salaries and in response to what we knew we were going to have to do as a result of the EEO Act.

Q. And as it related to incumbent employees?

A. Pardon me?

Q. As it related to incumbent employees?

A. Incumbent?

Q. Yes.

A. Yes.

Q. Those figures relate that of the $800 to $1,100 that only $300 to $400 of it would be accountable to the counties; Is that correct?

A. Yes.

[3912] Q. And that $500 to $700 would be–the State would be accountable for?

A. Yes.

Q. Or that would be the difference?

A. Yes.

Q. And was "18" your specific recommendation?

A. Beg your pardon?

Q. And what was "18"? Would you read "18" for us?

A. Eighteen says:

". . . No one gets less than $500."

We had concurred that we would do an across the board–at least $500–on those employees affected. It says:

". . . I believe no one will get less than $200 July, assuming the 5 percent increase."

At this stage–and I'm assuming this must have been done in the spring while the General Assembly was still in session and had not taken final action on salary increases–we had anticipated that no one would get less than a $200 total increase at that time.

Q. Was this actually, in fact, carried out?

A. Number 18?

Q. Number 18.

A. I cannot recall. I really can't. I do not remember what happened that year.

[3913] Q. Do you recall if the State did, in fact, get the counties to contribute $300 to $400?

A. I would say in the majority of the cases, no.

Q. The majority of the cases, no?

A. Yes.

Q. Did you ask the counties to contribute?

A. Yes. In every case, we asked the counties.

Q. You asked them to contribute and they didn't?

A. Yes.

Q. Did you follow up on it after you initially asked them?

A. What do you mean by "follow up"?

Q. I mean utilize the available leverage or resources that the State had to encourage counties to take an action that the Extension Service thinks is appropriate.

Mr. Manning, Sr.: Objection to the word "leverage." I don't know what you mean. Like the Federal Government holding up funds? Objection, if your honor pleases, to the form of the question.

The Court: Overruled. I'll let him say what he did.

The Witness: We have no leverage. Ours is totally persuasion, and we made a—I would say—concerted effort by persuasion. This was not something we [3914] sent them in a memorandum and asked them to respond to. We visited personally with the counties and explained to them what was being done and what their obligations were and asked for their contribution. We were successful in some; we were not successful in others.

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TRIAL TESTIMONY OF DONALD STORMER (EXCERPTS)

[4979] • • • • •

These other ones are similar. And again, I don't have the newspapers on all of these. This one says Whiteville, October 1981. There are just numerous—I doubt if there is a 4-H Club ever organized in the State of North Carolina that there isn't some public notification.

Q. What is the policy of the State 4-H and the North Carolina Agricultural Extension Service on notice with respect to race?

A. It is our policy that the organization of a unit will get public notification. These are handbills that are posted in schools and other places where kids frequent to let it be known that there is a club or group [4980] being organized; and that we would solicit their participation.

[4986] • • • • •

A. Yes. The state membership has remained relatively stable during that period time.

Q. At 95,453 in 1980?

A. Yes—beginning with 95,589 in 1974.

Q. Now, directing your attention to number 227—defendants' 227—would you explain that, please, sir, to the Court?

A. Yes. This is a racial breakdown for volunteers and 4-H members for the years '72, '76 and '80. I call your attention first to the volunteers. In 1972 there were 2,665 black volunteers. In 1980, there were 4,022. While the percentage of our total volunteers who were [4987] black decreased from 31 percent in '72 to 27 percent in 1980, the actual numbers increased greatly.

And I think you will see as you go to the white side of this table that we had a rather dramatic increase in the number of white volunteers as well, going from 5,988 in 1972 to 11,122 in 1980. And of course—

Q. (interposing) Now, also—excuse me. Go ahead.

A. Well, the importance of this I think you can see. We in our mission statement say 4-H is operated by volunteers. We label it as a key result area in our management matrix. And it is an area where we feel we have to perform to have a successful program.

Q. And in the growth total, you have moved from 8,600 to 15,144?

A. That is correct.

Q. Now, under 4-H membership, you have given your total growth there based on a racial breakdown?

A. Yes. In 1972 there were 22,174 black youngsters in the 4-H program. In 1980 there were 30,243, maintaining 32 percent of the membership. Conversely, in 1972, 46,313 were white; and in 1980, 64,138. You can see the growth of the program from '72 to '80.

Q. Just based on your experience, do you have any or can you give the Court any input as to why the black [4988]

leadership has dropped down; and yet the number of—other than between '76 and '80, the black membership has increased and increased really from '72 to 1980 by some 8,000 members?

A. Well, in actuality the numbers of black volunteers have increased. But the whites have increased at a faster rate, I think is the explanation there. You can see we almost doubled the corps of volunteers during that period. We did not double in membership.

And that has been our press—has been for volunteers. We feel that if we can get the volunteers, the children are there to be served.

Q. In both instances, what does the ratio of percentage of black leaders and members bear as to the ratio of population of the state?

A. Well, we are well above the State's population of about 22 percent, I believe—27 percent for volunteers and 32 percent for 4-H members at the present time.

* * * * *

[4992]

Q. Now, Dr. Stormer, were you involved in the decision that we have heard so much about as to not getting into the knock on door policies?

A. Yes.

Q. All right. Would you mind explaining your involvement to the Court in connection with that matter?

A. I guess I triggered that series of events with a memo that I wrote in 1977. I want to be candid with the Court in this case. I have a strong personal commitment to civil rights. And in the process of examining those initiatives, I got the wrong copy.

Another confession, I guess, is in order. There are three drafts of those 1974 initiatives. And when I sent my secretary to the file, I got "a draft" [4993] that was not "the draft" or the final draft. And it said something different than the final draft.

I wrote the memo explaining the reasonable effort rule to district chairmen and asked that the documentation be kept in those cases where it was used. Betsy Meldau, one of our district chairmen, quickly noted the discrepancy between my memo and those 1974 initiatives and called it to our attention.

And that started the sequence of discussions that finally wound up in the Administrative Council in terms of the Reasonable Effort Rule—or all reasonable effort.

The Court: Maybe he and Dr. Black better check behind their secretaries.

By Mr. Manning, Sr.:

Q. And what happened? Just briefly relate it. We have been into it before. But just briefly relate the sequence of events.

A. Well, in the discussion, I think we were all interested in being good citizens and doing everything that we thought was morally right to bring about as much integration as possible in our programs. And we had a number of discussions in terms of whether we should or should not adopt the Reasonable Effort Rule.

And we finally took it to the Administrative [4994] Council for discussion. As you have heard before, there was unanimity among the Council that we would go ahead with the Reasonable Effort Rule based on some consultation. Based on that and some other further discussions that we had as program leaders, we rescinded that action and did not go with Reasonable Effort.

Now, my reasoning for not going with it was different than some others, as I have heard testimony being given here.

Q. What was your reasoning?

A. I guess there are two reasons, the first one being that this case was apparently coming to a close. We had the 1974 initiatives in the field.

Q. I believe the judge would feel better if you would say it was coming to trial, because at this point he doesn't think it is ever coming to a close.

A. There was some action in this particular case.

The Court: Mr. Manning, you have expressed the Court's feelings with customary exactitude.

Mr. Manning, Sr.: Your pain caught me all the way out here, your honor. That is why I felt compelled to say that.

By Mr. Manning, Sr.:

Q. All right, sir?

A. We already had the 1974 initiatives in the [4995] field with the pending activity in this case. If we went to the field with the All Reasonable Effort provision and then the Court would decide something else, we could have had three different sets of initiatives in the field within a period of approximately five years.

And I felt that would be very confusing because, you know, we don't just go to the field and train our staff. If we start working in an area like this, we go to our Advisory Committees. We talk it through with them. We believe that the only way you get commitment is through involvement; and that the people would have to act and react to these things and help us accomplish them.

And to go out and do that three times within five years with something different would not be very helpful to our cause.

Q. What was your other reason?

A. Well, the second reason was it is just not good management to ask our agents to go knock on doors. If you are going to work through others, then you do it that way. And we had requested that our agents function more as managers and quit operating. And this would be a request to have them operate again.

Q. What would be the effect of taking an agent's time to have the agent knock on doors in the concept of your management of your program?

[4996] A. Well, you will have a net reduction in program. You have to have. If you divert management time to operating time, you are using your resources in a different way. And it would have to influence the kind of outreach that an agent could make.

Q. If you take the agent's time in this specific area to do this specific function, what would be its effect on his other duties that you have already enumerated?

A. Well, someplace—he would have to give up something from management to go operate. And we would have a reduction in program quality or in quantity. It would have to happen that way.

Q. Now, in connection with the actual efforts to mix two clubs in a community—either white or black—would you give the court your experience as to the basic formation of community clubs and what experience, if any, you had, say, in Texas in this area, which was operating under a court order?

A. Well, that strategy is basically a loser from my experience. People who have a club—

[5028] * * * * *

A. This is paragraph four of this memorandum. It says,

"The single most vulnerable area in assessing the progress of State 4-H affirmative action programs is the high number of 4-H clubs and 4-H special groups in mixed communities which have youth of only one racial-ethnic group. Approximately one-half of the states each have more than 500 such units."

Q. Now, utilizing that information, did you make a calculation to compare North Carolina with that information?

A. Yes, I did.

Q. Did you prepare an exhibit to that effect?

A. I did.

Q. Is that exhibit number 229?

A. Yes.

Mr. Manning, Sr.: At this time, in the interest of having him explain it with the Court having a copy, I would like to offer in evidence defendants' exhibit 229.

(Defendants' Exhibit 229 was marked for identification and received in evidence.)

[5029] By Mr. Manning, Sr.:

Q. Now, if you would, would you go through the processes that you used, using 229 as a basis, how you arrived at your comparison?

A. Using 500 as the median number of units—you will recall a median is a middle number different from a mean—I took an array of the states' enrollments for that year, 1978, and found the median figure in that array which was Minnesota with an enrollment of 67,518.

North Carolina's enrollment in 1978 was 97,045. With these data, you can proportion what you might expect in North Carolina using that kind of a computation. You simply set up a proportion that 67,518 is to 500 as 97,045 is to "x" and cross-multiply.

The expected number of such units in North Carolina, proportioned on the basis of enrollment, would be 719. The actual number in 1978—

Q. (interposing) Is that 718 or 719?

A. 718. The actual number was 920. Now, that computation does not account for race, only for total numbers of members.

Take another tack with it. North Carolina's 4-H program ranks seventh in the nation in terms of black youth participating. That is better than 42 other states. So we simply take the 25th, with 500, and 42 [5030] which is our position with respect to other states in terms of blacks, and we can proportion again. We would come up with an expectation of 840 such units, based on participation by race.

Q. Rather than the 920 just based on the number of units?

A. 920 was the actual number of such units that we had in 1978.

In the first case, we had 202 more units than would be expected on the basis of membership alone. On the basis of race, we had 80 more units than would be expected based on racial composition. Those differences can probably be attributed to affirmative action programs. My feeling is that that is rather a high cost in terms of achieving some—if you took an average of those two, it is something like 140 units.

This would support, I think, Dr. Blalock's testimony that this is not cost effective.

Q. Now, while we are talking about affirmative action recommendations, are you familiar with the first affirmative action recommendation that came out from the United States Department of Agriculture?

A. Yes.

Q. And what did that call for to be done?

A. The first statement in the guidelines, "All [5031] Reasonable Efforts," was nothing more than a phrase in the regulations. It was later defined by saying that in a targeted area of a 4-H Club, we had to get a signed affidavit from all of the minorities saying that they did not wish to participate in our program. That was the first definition of "all reasonable efforts."

Q. That was a definition and not a regulation, was it not?

A. Well, it was a regulation. That was what we had to do.

Mr. Craige: Point of Clarification. What point in time are we talking about, and is there any documentation of Mr. Stormer's statement?

The Witness: We are talking January 1973. I think I can get that close for the first one. I don't have a record of it at the moment.

By Mr. Manning, Sr.:

Q. Were you involved in it?

A. Yes, sir, deeply.

Q. That particular method of going out was a recommendation, was it not, not a regulation?

A. No, sir.

Q. It was a regulation?

A. Yes, sir.

Q. Was it retracted?

[5032] A. Yes.

Q. After that, the next recommendations came in the form of what?

A. A three-step process defining and regulating "all reasonable efforts."

Q. Is that the document, "Strengthening 4-H Programs"?

A. It came out earlier than this document, I believe, but this is a document explaining "all reasonable efforts." This one is dated 1979.

The redefinition came during the calendar year of 1973, I believe, after a protest from ECOP, the Extension Committee on Organization and Policy, in terms of the unreasonableness of "all reasonable effort."

Q. Now, it is your opinion based on the decision, of the action in North Carolina, that it was not economically feasible from a management point of view?

A. It is not cost effective.

Q. And you supported that decision then, and do you still now support it?

A. I do.

* * * * *

GOVERNMENT EXHIBIT 30

Number and percent of NCCES Homemaker Clubs by racial composition of the club and number of members by race

Clubs	All White Clubs	All Non-White Clubs	Integrated Clubs
1972	1,378 (73.8%)	466 (25%)	22 (1.2%)
1971	1,449 (73.7%)	491 (25%)	26 (1.3%)
1968	1,562 (73.0%)	569 (26.5%)	10 (.5%)
1966	1,022 (60.8%)	658 (39.2%)	None listed (0%)

Members	White	Non-White
1972	24,115 (77.8%)	6,869 (22.2%)
1971	25,313 (77.2%)	7,485 (22.8%)
1968	28,023 (75.6%)	9,063 (24.4%)
1966	20,641 (54.5%)	17,227 (45.5%)

Sources: 1) Exhibit 18 of Defendants' Answers to Plaintiffs' first interrogatories of February 4, 1972, interrogatory Number 30, and exhibit Number 1 to the Deposition of Eloise Cofer. A copy of the exhibit 18 is attached. 2) List of North Carolina Homemaker Clubs for 1972 by county showing name of club, total membership, white members and non-white members, produced pursuant to Plaintiff-Intervenor's Rule 34 Request for Production of Documents, of June 8, 1972, Number 2s, and pursuant to Plaintiff-Intervenor's December 21, 1972—Rule for Production of Documents No. 13.

N.C.C.E.S. HOMEMAKER CLUBS

Number and Percent of Members in One Race and Multi-race Clubs

	Members in All White Clubs	Members in All Non-White Clubs	Members in Multi-race Clubs
1972	23,925 (77.2%)	6,694 (21.6%)	365 (1.2%)
1971	24,980 (76.2%)	7,288 (22.2%)	530 (1.6%)
1968	27,913 (75.3%)	8,995 (24.2%)	178 (.5%)
1966	20,641 (54.5%)	17,227 (45.5%)	0 (0%)

Source: 1) Exhibit 18 of Defendants' answers to Plaintiffs' first interrogatories of February 4, 1972, interrogatory No. 30, and exhibit No. 1 to the Deposition of Eloise Cofer. 2) List of North Carolina Homemakers clubs for 1972 by county showing name of club, total membership, white membership and non-white members, produced pursuant to Plaintiff-Intervenor's Rule 34 request for production of documents of June 8, 1972, Number 2s, and pursuant to Plaintiff-Intervenor's Rule 34 request for production of documents of December 21, 1972, No. 13.

EXTENSION HOMEMAKER CLUBS

1971

County	Clubs All White	Clubs All Non-White	Clubs Integrated	Members All White	Members All Non-White	White	Members Integrated Non-White
Alamance	23	7		419	171		
Alexander	9			175			
Alleghany	9	1		150	24		
Anson	10	10		122	12[illegible]		
Ashe	7			135			
Avery	10			250			
Beaufort	11	4		149	35		
Bertie	10	9		104	71		
Bladen	18	9		309	141		

County	Clubs All White	Clubs All Non-White	Clubs Integrated	Members All White	Members All Non-White	White	Members Integrated Non-White
Brunswick	4			80			
Buncombe	32		1	629		17	1
Burke	14			225			
Cabarrus	24			411			
Caldwell	15			216			
Camden	4	3		65	31		
Carteret	10	1		179	21		
Caswell	16	9		252	125		
Catawba	29			473			
Chatham	13	11		227	149		
Cherokee	7	1		96	10		
Chowan	13	4		200	50		
Clay	7			70			
Cleveland	18	14		282	237		
Columbus	17	5		271	54		
Craven	11	5		180	65		
Cumberland	14	9	1	263	112	5	1
Currituck	10	2		153	54		
Dare	8			150			
Davidson	20			380			
Davie	12	1		182	14		
Duplin	15	8		227	100		
Durham	20	5		337	61		
Edgecombe	13	7		287	200		
Forsyth	31	10		621	135		
Franklin	8	11		95	140		
Gaston	30	1	1	732	11	13	2
Gates	9	10		147	162		
Graham	5		1	80		1	19
Granville	6	11		81	113		
Greene	6	6		104	77		
Guilford	23	11		414	126		
Halifax	13	11		220	167		
Harnett	5		15	65		182	47
Haywood	24	1		513	17		
Henderson	23			460			
Hertford	12	15		158	179		
Hoke	9	4		172	46		

County	Clubs All White	Clubs All Non-White	Clubs Integrated	Members All White	Members All Non-White	White	Members Integrated Non-White
Hyde	8	1		100	16		
Iredell	22	7		552	102		
Jackson	7			132			
Johnston	17	6		300	100		
Jones	8	3		79	41		
Lee	15	1		331	15		
Lenoir	15	12		202	155		
Lincoln	18	2		241	20		
McDowell	16			284			
Macon	20			449			
Madison	9			150			
Martin	16	7		297	105		
Mecklenburg	25	14		649	271		
Mitchell	12			181	148		
Montgomery	10	1		135	15		
Moore	16	5		238	53		
Nash	13	12		166	164		
New Hanover	13	10		235	148		
Northampton	12	7		178	106		
Onslow	17			222			
Orange	14	15		210	224		
Pamlico	10			127			
Pasquotank	14	7		204	97		
Pender	13	3		198	37		
Perquimans	9	10		110	189		
Person	8	7		120	153		
Pitt	18	10		287	171		
Polk	7	1		105	10		
Randolph	14	6		223	94		
Richmond	12	4		176	49		
Robeson	15	26	1	289	487	1	35
Rockingham	25	11		340	118		
Rowan	30	11	1	761	227	90	33

County	Clubs All White	Clubs All Non-White	Clubs Integrated	Members All White	Members All Non-White	White	Members Integrated Non-White
Rutherford	20			300			
Sampson	19	9		301	91		
Scotland	14			220			
Stanly	19	3		325	33		
Stokes	17			347			
Surry	22			418			
Swain	11			190			
Transylvania	12			200			
Tyrrell	13			155			
Union	11	9		142	96		
Vance	10	12		123	160		
Wake	29	11		463	147		
Warren	12	13		138	193		
Washington	11	1		178	15		
Watauga	12			201			
Wayne	15	11		249	119		
Wilkes	21			420			
Wilson	25	5		503	101		
Yadkin	13			196			
Yancey	8			130			
Cherokee Reservation			5			23	59
	1,449	491	26	24,980	7,288	333	197
Grand Total	1,956			32,798			

EXTENSION HOMEMAKER CLUBS

December 18, 1968

	All White		Non-White		Integrated		
Western	Clubs	Members	Clubs	Members	Clubs	White	Non-White
Avery	11	265					
Buncombe	35	834			1	15	1
Burke	13	225					

	All White		Non-White		Integrated		
Western	Clubs	Members	Clubs	Members	Clubs	White	Non-White
Cherokee	10	103	1	12			
Clay	8	120					
Graham	5	85	1	25			
Haywood	25	518	1	23			
Henderson	22	450			1	16	3
Jackson	14	240					
Macon	18	430					
Madison	9	150					
Mitchell	9	150					
McDowell	16	272					
Polk	7	110	1	10			
Rutherford	20	300	1	15			
Swain	12	226			2	41	2
Transylvania	12	216					
Yancey	7	120					
Northwestern							
Alamance	27	433	9	164			
Alexander	11	225					
Alleghany	10	200					
Ashe	10	165					
Caldwell	15	240					
Caswell	15	226	11	150			
Chatham	16	214	13	226			
Davidson	23	380					
Davie	15	275	1	25			
Forsyth	32	760	11	160			
Guilford	24	449	12	153			
Randolph	17	300	9	150			
Rockingham	34	596	11	220			
Stokes	16	340					
Surry	26	475					
Watauga	12	185					
Wilkes	23	500					
Yadkin	14	300					
Southwestern							
Anson	13	170	13	145			
Cabarrus	23	405			1	19	1

	All White		Non-White		Integrated		
Western	Clubs	Members	Clubs	Members	Clubs	White	Non-White
Catawba	27	500					
Cleveland	16	324	14	279			
Gaston	25	510					
Hoke	11	190	2	21			
Iredell	22	532	9	118			
Lee	15	265	1	20			
Lincoln	21	275					
Mecklenburg	30	655	13	239			
Montgomery	11	210					
Moore	17	240	8	100			
Richmond	17	233	8	83			
Rowan	33	845	12	255			
Scotland	13	225					
Stanly	19	325	1	21			
Union	12	185	10	135			
Southeastern							
Bladen	19	328	7	115			
Brunswick	6	100					
Cartaret	9	176	2	34	1	12	3
Columbus	17	278	8	112			
Craven	11	136	9	57			
Cumberland	16	282	11	200			
Duplin	19	284	10	122			
Greene	11	213	6	100			
Jones	10	95	6	50			
Lenoir	13	170	12	132			
New Hanover	12	264	9	118			
Onslow	15	262			1	14	2
Pamlico	13	183					
Pender	11	153	8	260			
Robeson	17	210	33	540			
Sampson	22	375	11	152			
Wayne	19	323	14	169			
East Central							
Beaufort	13	175	6	100	1	13	6
Durham	20	386	5	191			

Western	All White Clubs	All White Members	Non-White Clubs	Non-White Members	Integrated Clubs	Integrated White	Integrated Non-White
Edgecombe	15	355	8	285	1	1	19
Franklin	11	152	12	150			
Granville	9	114	10	100			
Harnett	19	300	7	88			
Johnston	19	355	7	130			
Martin	14	254	9	159			
Nash	13	221	11	19[illegible]			
Orange	15	245	14	226			
Person	9	200	13	222			
Pitt	20	340	12	190			
Vance	11	166	11	162			
Wake	30	568	12	198	1	9	1
Warren	14	182	14	185			
Wilson	24	500	7	157			
Northeastern							
Bertie	13	225	18	303			
Camden	6	87	3	54			
Chowan	13	204	9	98			
Currituck	13	202	1	36			
Dare	1	115	1	10			
Gates	10	135	11	168			
Halifax	14	350	12	200			
Hertford	13	178	16	192			
Hyde	8	145	1	48			
Northampton	12	177	12	105			
Pasquotank	12	221	8	137			
Perquimans	9	106					
Tyrrell	13	80					
Washington	11	177					

1966

EAST CENTRAL DISTRICT

County	Negro No. Clubs	Negro Members	White No. Clubs	White Members
Beaufort	12	384	20	375
Durham	7	251	17	410
Edgecombe	13	365	17	400
Franklin	16	540	19	300
Granville	15	529	13	206
Harnett	10	150	20	365
Johnston	9	218	27	550
Martin	8	300	15	258
Nash	12	277	33	594
Orange	12	301	16	385
Person	13	405	10	275
Pitt	18	370	21	457
Vance	14	441	16	305
Wake	23	520	33	645
Warren	21	386	17	244
Wilson	12	255	24	500
	215	5,692	318	6,269

NORTHEASTERN DISTRICT

Bertie	15	249	15	238
Chowan	12	239	15	181
Gates	13	235	12	137
Halifax	15	665	17	325
Hertford	16	480	14	230
Northampton	12	325	14	207
Pasquotank	8	118	12	290
Perquimans	10	379	10	175
	101	2,690	109	1,783

NORTHWESTERN DISTRICT

County	Negro		White	
	No. Clubs	Members	No. Clubs	Members
Alamance	6	216	21	422
Caswell	14	385	18	310
Chatham	14	400	20	470
Forsyth	12	385	33	875
Guilford	15	496	35	798
Randolph	14	385	18	375
Rockingham	12	302	32	620
	87	2,569	177	3,870

SOUTHEASTERN DISTRICT

Bladen	16	550	21	425
Columbus	9	285	23	395
Craven	13	150	15	265
Cumberland	12	300	12	424
Duplin	10	200	29	450
Greene	9	200	14	318
Lenoir	12	176		
New Hanover	11	201	16	389
Pender	9	280	18	280
Robeson	19	667	37	725
Sampson	15	395	25	575
Wayne	14	328	23	471
	149	3,732	233	4,717

SOUTHWESTERN DISTRICT

County	Negro		White	
	No. Clubs	Members	No. Clubs	Members
Anson	15	369	14	210
Cleveland	13	397	18	417
Iredell	16	368	27	640
Mecklenburg	13	412	32	822
Moore	10	175	21	388
Richmond	13	300	22	325
Rowan	13	273	31	775
Union	13	250	20	425
	106	2,544	185	4,002

GOVERNMENT EXHIBIT 69

EXTENSION PERSONNEL THAT HAVE BEEN APPOINTED COUNTY EXTENSION CHAIRMAN SINCE 1968 NORTH CAROLINA AGRICULTURAL EXTENSION

MAY 1981

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
	Chowan			1981	Mike Williams Zackie Harrell Henry Riddick
Eugenia Ware	Rutherford	Same	W	1981	Steven West Dewey Hennessee
Fred May	Pamlico	Robeson	W	1981	R. Ray Harris
Frank Green	Rockingham	Same	W	1981	No other applicants
J. M. Pittman	Avery	Wake	W	1980	Johnnie Hensley

[1] All were Extension agents before becoming chairman. Some transferred from one County to another after becoming chairman.

[Continued on following pages]

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
John Reeves	Clay	Cherokee	W	1980	No other applicants
Alvin M. Stanford	Cabarrus	Priv. Industry	W	1980	William Triplett
James R. Mabe	McDowell	Same	W	1980	No other applicants
Donald Cobb	Vance	Granville	W	1980	Phyllis Stainback Fred Belfield
James Carey	Ashe	Cumberland	W	1980	Robert F. Breland Dana Tugman
John W. Dunham	Hertford	Bladen	W	1980	James Daughtry James E. Wright
W.R. Jester	Perquimans	Tyrrell	W	1980	Henry C. Riddick
Hover Royals	Anson	Same	B	1980	No other applicants
James Stephenson	Nash	Vance	W	1980	Fred Belfield Bryan Page
George Biddix	Buncombe	Rutherford	W	1980	J.B. Reeves Reagon Ammons
B.F. Spencer	Cleveland	Same	W	1979	No other applicants

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
John Richardson	Robeson	Same	W	1979	M.K. Dennis
John Hall	Lee	Same	W	1979	Fay T. Donnell Clarence J. Cameron
M.C. Small	Jones	Caswell	W	1979	Charles Hammon Fletcher Barber
Bill Rogister	Northampton	Hertford	W	1979	No other applicants
James D. Stephenson	Vance	Nash	W	1979-80	Phyllis Stainback Marshall Bowden
C.E. Lewis	New Hanover	State Specialist	W	1979	Thomas Dail Harvey Morris James E. Warren
L.N. Whitt	Caswell	Same	W	1979	Donna Pointer
Reginald Piland	Pamlico	Same	W	1979-80	No other applicants
L.C. Cooper	Warren	Same	B	1979	George Koonce Emily Ballinger
Dan Baucom	Onslow	Same	W	1979	Charles E. Hammond Chase Padgett

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
M.K. Dennis	Bladen	Same	W	1979	Harvey Morris
C.E. Hammond	Moore	Area Agent	W	1979	Tom Colson Paul Seabolt Clarence Cameron
W.E. Mainous	Davie	Forsyth	W	1979	Judge A. Pierce Ronnie Thompson
James Ray	Yancey	Cherokee Reservation	W	1979	Carlos Bickford Johnny G. Hensley
J.D. Carroll	Forsyth	Guilford	W	1979	W.E. Mainous
Talmadge Baker	Randolph	Moore	W	1979	Dick Petersen Drue Finette Richard Freeman Doug Young Rodney Haines
Wesley Townsend	Wayne	Same	W	1978	John H. Wynne William Lamm

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
James H. Caudill	Rowan	Same	W	1978	Rodney Haines
Lois Britt	Duplin	Same	W	1978	Robert Swain S.B. Wilson
Leroy James	Pitt	Same	B	1978	No other applicants
O.R. Ammons	Polk	Burke	W	1977	Carlos P. Bickford Judy M. Groff
W.J. Griffin	Bertie	Perquimans	W	1977	No other applicants
David Terrell	Mitchell	Same	W	1977	No other applicants
Helen Dosier	Alleghany	Same	W	1977	William Fowler Walden M. Hearn
Frank Baker	Granville	Wayne	W	1977	I.W. Murfee Dorothy Wilkinson
Gene Brewer	Watauga	Same	W	1977	No other applicants
C.H. Jernigan	Wilson	Same	W	1977	Frank Baker
R.A. Hayes	Greene	Wilson	W	1977	No other applicants
B.T. O'Neill	Cumberland	Same	B	1976	No other applicants

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
David Choate	Lincoln	Same	W	1976	A.L. Smith Howard Waymick
V.B. Lynn	Wake	Same	W	1976	No other applicants
M.C. Howell	Union	Same	W	1976	P.E. Bazemore
R.M. Coleman	Brunswick	Same	W	1976	Dan E. Baucom M.K. Dennis
C.D. Bunn	Swain	Same	W	1976	Roger Hyatt
Robert R. Hyatt	Transylvania	Buncombe	W	1976	Roger Hyatt James H. Ray Dennis Winters Linda Best
E.E. Bishop	Cabarrus	Same	W	1976-80	J.P. Bowles
Bruce Woodard	Johnston	Cumberland	W	1976	David Stanaland Frank Baker Harold Lloyd Peter Westerbeck H.F. Palmer James Stephenson Leroy James

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
Millis B. Wright	Alamance	Robeson	W	1975	Richard J. Freeman
D.R. Burnette	Buncombe	4-H Specialist	W	1975-80	C.P. Bickford J.D. Brooks Nancy Stancil Robert Hyatt
J.F. Simpson	Stanly	Same	W	1975	Carol Baker Ray Kiser Fredrick J. Rivers
W.F. Walker	Pender	Same	W	1975	Dan E. Baucom J.G. Richardson John Wynne
Keeneth Vaughn	Iredell	Chatham	W	1975	D.O. Ivey S.D. Little Jack Smith, Jr.
M.C. Griffin	Beaufort	Duplin	W	1975	H.C. Riddick Jack Cullipher

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
					R.M. Pilch W.M. Hearn Gordon Sawyer Steve Warrick Gaylon Ambrose Harvey Morris
F.J. Rivers	Person	Tyrrell	W	1975	M.B. Wright
F.S. Volvia	Tyrrell	Same	W	1975	No other applicants
T.S. Godwin	Wayne	Same	W	1975-78	Frank Baker William Lamm Wesley Towsend B.T. McNeill
L.L. Allen	Martin	Nash	W	1975	R.M.K. Edwards C.J. Cameron P.C. Bryant
G.D. McCullen	Columbus	Same	W	1975	M.K. Dennis Harold Lloyd

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
					Harvey Morris John Spaulding
Donald Baker	Pasquotank	Columbus	W	1974	W.M. Hearn, Sr. J.R. Vaughn Harvey Morris Victor Lynn
H.L. Miller	Burke	McDowell	W	1974	R.M. Bowden Roger Hyatt Robert Hyatt
B.G. Westbrook	Alexander	Same	W	1974	Roger Hyatt Kenneth Patterson
M.C. Small	Caswell	Currituck	W	1974-79	
E.J. Long	Northampton	Same	W	1974-75	Fred Belfield Doug Eason
H.M. Ramseur	Wilkes	Alexander	W	1974	M.B. Wright
W.C. Richardson	Watauga	Same	W	1974-77	Gene R. Brewer

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
					Rodney Haines Agnes A. Greene Henry B. Hagwood Harold Lloyd C.D. Bunn James W. Gentry Patrick Guyer
Alvin Stanford	Iredell	Priv. Industry	W	1973-75	D.O. Ivey H.M. Stoney H.W. Myers
Herman McCall	Haywood	Same	W	1973	H. Leslier Miller
W.S. Lamm	Lenoir	Wayne	W	1973	John H. Wynne W.N. Pagton G.E. McDaniel R.L. Strough Walter C. Johnson T.S. Godwin

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
					C.H. Jernigan F.H. Baker
Walter Bowers	Montgomery	Same	W	1973	No other applicants
Jack Barnes	Stokes	Same	W	1973	M.B. Wright C.J. Cameron
Edwin Nolley	Catawba	Same	W	1972	
W.C. Holtzman	Davidson	Forsyth	W	1972	Wade Johnson Lathan Smith
Fred Rivers	Tyrrell	Industry	W	1971-75	
William Shackelford	Nash	Same	W	1971-80	
Carl Hodges	Durham	Same	B	1971	
James Goff	Harnett	Same	W	1971	
Zackie Harrell	Gates	Same	W	1970	C.M. Grimes
Phil Haas	Mecklenburg	Same	W	1970	
Joe Perry	Edgecombe	Same	W	1970	

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
Earl Wise	Madison	Same	W	1970	No other applicants
Robert Rollins	Macon	Same	W	1970	George Conrad Earle Wise
Walter Johnson	Greene	Same	W	1970-77	
Talmadge Baker	Moore	Ashe	W	1970-79	
Aubrey Hardee	Granville	Same	W	1970-77	
Richard Bryant	Perquimans	Same	W	1970-79	
Jerry Purser	Transylvania	Durham	W	1970-76	
William Bledsoe	Yancey	Buncombe	W	1970-79	
Grover Westmoreland	Henderson	Dairy Specialist	W	1970	No other applicants
W.W. Avery	Avery	Same	W	1970-80	Leslie Miller Woodie Richardson
Robert Wesson	Montgomery	Same	W	1970-73	
Raymond Thompson	Chowan	Same	W	1970-81	
Ed Simpson	Craven	Same	W	1970	

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
Samuel Yourg	Yadkin	Same	W	1969	No other applicants
Edwin Yancey	Pitt	Johnston	W	1969-78	
Gordon Sawyer	Camden	Halifax	W	1969	
Enos Rogister	Hertford	Camden	W	1969-79	
William Corbin	Alleghany	West Virginia	W	3/69-8/69	No other applicants
Roger Murdock	Alleghany	Virginia Ext.	W	8/69-76	No other applicants
Ebert Pierce	Orange	Yadkin	W	1969	
John Stacy	Union	Catawba	W	1969-76	
Bruce Woodard	Cumberland	Wake	W	1969-76	
Henry Ramseur	Alexander	Industry	W	1968-74	No other applicants
James Bunce	Carterett	Same	W	1968	
Laverne Hardage	Warren	Same	W	1968-79	
John Crawford	Guilford	Rutherford	W	1968	
Murray Goodwin	Tyrrell	Same	W	1968-71	

GOVERNMENT EXHIBIT 74

PROMOTIONS TO COUNTY CHAIRMAN
(1962-1981)

Year	White	Black	Indian	Total
1962-63	103	0	0	103
1964	1	0	0	1
1965	6	0	0	6
1966	5	0	0	5
1967	5	0	0	5
1968	6	0	0	6
1969	9	0	0	9
1970	16	0	0	16
1971	3	1	0	4
1972	2	0	0	2
1973	5	0	0	5
1974	7	0	0	7
1975	11	0	0	11
1976	8	1	0	9
1977	8	0	0	8
1978	3	1	0	4
1979	16	1	0	17
1980	10	1	0	11
May 1981	3	0	0	3
TOTAL	227	5	0	232

Source: NCAES Personnel Directories; Personal Data Cards; Defendants' Response to Plaintiff-Intervenor's Letter of April 9, 1981.

GOVERNMENT EXHIBIT 98

ANALYSIS OF 1971 EFFORT TO EQUALIZE SALARIES OF BLACKS AND WHITES

County Professional Positions	1970 Average Salary		1971 Average Salary		Percent Change in Avg. Salary (1970-71)		Average Salary Difference (W-B)	
	White	Black	White	Black	White	Black	1970	1971
County Chairman	12,986	•	13,637	13,375	5.0	•	•	262
Agricultural Extension Agent	10,871	10,439	11,494	11,147	5.7	6.8	432	347
Associate AEA	9,876	8,956	10,240	9,558	3.7	6.7	920	682
Assistant AEA	8,796	8,671	9,126	8,505	3.8	– 1.9	125	621
Home Economics Agent	9,893	9,802	10,599	10,492	7.1	7.0	96	107
Associate HEA	8,553	8,195	9,146	9,040	6.9	10.3	358	106
Assistant HEA	7,852	7,796	8,240	8,113	4.9	4.1	56	127
Total	11,005	9,517	11,639	10,120	5.8	6.3	1,488	1,519

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GOVERNMENT EXHIBIT 157 (EXCERPT)

[HANDWRITTEN MEMORANDUM]

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7. Obviously one of the areas where we'll be checked is on salary – Easy to measure & at least see if there appears to be any. Already had to supply salary figures on state staffs for all personnel – identifying race, sex, tenure, highest degree, etc.

8. Believe you'd agree our salaries for women & non-white men on average are lower – Our figures verify – Due to several factors.

– The competitive market – This is not acceptable as a reason though.

– Tradition – Not just in Ext.

– Less county support for non-white positions.

9. Don't believe there's any reason to spend lot of time rationalizing why it has or has not been & whether it's right or wrong. This is past & we can't do a whole lot about it – We can & must for the future.

10. For county personnel we – AES – are not totally at fault & AES can't correct the problem alone. Counties must share in this & where they have been low they must help correct their portion.

11. Review differences in salary between men & women by titles – *Don't use actual figures of salary averages.*

12. Review summary of county support by race & sex – Have supported non-white positions about 5-6% lower.

13. Was our feeling that would be to our advantage – plus simply the right thing to do – to move to make some salary adjustments as quickly as pos. & preferably before our plan went into Washington.

14. Review what's happened in Michigan & Illinois.

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15. We have "squirrelled" a little money for past year and after *much* effort persuaded budget people downtown to let us use it—much of which would have been lost July 1—to make some salary adjustments. Reduced vacant positions used almost all our reserves & about every uncommitted dollar we [had?]. Originally proposed to give adjustment & anticipated July raise at same time. After PA-1's were typed they got cold feet & said we couldn't give July raises because weren't assurred [sic] there'd be any. Had to go back & adjust on more.

16. Asked Dist. Chs. to give us a figure of adjustment needed on women & non-white men positions in their District & the portion that State should assume. As best we could [,] we've followed these recommendations.

17. Majority are $500-$700 range—County should probably do $300-$400 also—for total of $800-$1100.

18. No one gets less than $500, I believe. No one will get less than $200 July—assuming 5% increase.

19. This will relieve pressure on our other salary increase money—Not that this will affect raise these people will get July 1 but will mean we will not have to take regular salary increase money & use to make these adjustments. Were never able to [*sic*] this on non-white positions & thru years we have used a heavier than average amount to try to correct some of these inequities. So this is really going to help every other member of the Ext. staff.

20. You should call this to attention of commissioners. If complaint is filed they will be included for their portion of the salary.

21. Have not corrected all our problems. Are going to try to do a few more July 1.

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GOVERNMENT EXHIBIT 173

UNITED STATES DEPARTMENT OF AGRICULTURE
SCIENCE AND EDUCATION ADMINISTRATION

Office of the Deputy Director for Extension
Washington, D.C. 20250

May 9, 1978

SUBJECT: Trends in State 4-H Affirmative Action Programs

TO: Assistant Directors and State Leaders, 4-H-Youth

Extension 4-H staff and volunteer leaders are to be commended for an impressive record in expanding 4-H program opportunities for minority youth. Ten years ago (1968) national 4-H enrollments totaled 2,297,760 of which *356,021* were minority youth. The 1977 enrollments of youth in 4-H clubs, 4-H special interest groups and 4-H EFNEP totaled 4,918,231 of which *1,218,011* were minority youth—well over three times as many as in 1968.

The percentage of youth participants from minority racial-ethnic groups attending Extension 4-H conducted camps increased from 19.5% in 1972 to 22.5% in 1977. Nationwide, more than 60% of the camp sessions involved youth of more than one racial-ethnic group. It is essential that continued efforts to made [sic] to conduct all 4-H camps in a non-discriminatory manner.

More than 10,000 additional 4-H volunteers from minority groups served in 1977 than served in 1972 with 4-H clubs and 4-H special interest groups. Additional minority volunteers assisted 4-H EFNEP.

The single most vulnerable area in assessing the progress of State 4-H affirmative action programs is the high number of 4-H clubs and 4-H special interest groups in

mixed communities which have youth of only one racial-ethnic group. Approximately one-half of the States each have more than 500 such units.

We suggest that you identify the counties in your State where there are such 4-H units and counsel with county staffs. Many counties having only a few minority families have identified 4-H program service areas or community boundaries of such size as to cover major portions of an entire county – sometimes the whole county. In such cases all of the 4-H clubs in such areas or county are considered to be in a mixed race area. It may be appropriate in such instances for staff working with the County 4-H Expansion and Review Committees to review, and if desirable, redraw the boundaries. When this is done, record of the changes and reasons for them should be on file in the county office.

We are enclosing a copy of the trend summary for your State from 1968 through 1978. You may find this helpful as you work with counties on 4-H affirmative action in the months ahead.

Once again, you and members of your staff are to be commended on the progress during the past 10 years.

Sincerely,

E. DEAN VAUGHAN
4-H – Youth
Enclosure
4-H-30 (5-78)

State NORTH CAROLINA

NUMBERS AND PERCENTAGES OF ENROLLMENTS IN 4-H OF YOUTH FROM MINORITY RACIAL-ETHNIC GROUPS

Year	Enrollments in 4-H Clubs: Total	4-H Special Interest Groups: Youth From Minority Racial-Ethnic Groups	4-H Special Interest Groups: Percent of 4-H Enrollment From Minority Groups
1968	NO REPORT	NO REPORT	NO REPORT
1969	54,654	21,862	40.0
1970	56,926	19,725	34.7
1971	65,139	22,119	34.0
1972	69,307	22,964	33.1
1973	81,834	27,721	33.9
1974	95,589	36,522	38.2
1975	90,640	33,491	36.9
1976	93,408	33,262	35.6
1977	97,954	35,834	36.6
Enrollments of Youth in 4-H EFNEP (1973 First Year Racial-Ethnic Data Avail.)			
1973	45,646	29,337	64.3
1974	41,259	26,893	65.2
1975	39,576	27,681	69.9
1976	28,893	20,111	69.6
1977	27,725	18,794	67.8

Total 4-H Enrollments in 4-H Clubs, 4-H Special Interest Groups, 4-H EFNEP

1973	127,490	57,058	44.8
1974	136,848	63,415	46.3
1975	130,216	61,172	47.0
1976	122,301	53,373	43.6
1977	125,679	54,628	43.5

State NORTH CAROLINA

NUMBERS OF 4-H UNITS—4-H CLUBS AND 4-H SPECIAL INTEREST GROUPS—BY TYPES OF COMMUNITY AND PERCENTS OF 4-H UNITS IN MIXED COMMUNITIES WHICH ARE INTEGRATED

Year	Total Number of 4-H Units	Number of 4-H Units Not In Mixed Communities	Number of Integrated 4-H Units—In Mixed Communities	Number of 4-H Units Not Integrated—In Mixed Communities	Percent of 4-H Units In Mixed Communities Which Are Integrated
1972	2,587	1,109	586	892	39.6
1973	2,857	1,122	771	964	44.4
1974	3,182	1,151	1,017	1,014	50.0
1975	3,255	1,241	1,108	906	55.0
1976	3,298	1,085	1,260	953	56.9
1977	3,068	1,028	1,142	898	56.0

YOUTH ATTENDING EXTENSION 4-H CONDUCTED CAMP SESSIONS

Year	Total Youth Attending	Minority Youth	Percent Minority of Total Attending
1972	13,171	5,598	42.5
1973	17,284	8,367	48.4
1974	22,511	11,719	52.1
1975	22,566	12,193	54.0
1976	19,514	8,487	43.5
1977	18,427	7,694	41.8

GOVERNMENT EXHIBIT 182 (EXCERPTS)

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1974 CIVIL RIGHTS INITIATIVES FOR DISCUSSION AT MEETING ON APRIL 5, 1974

• • • • •

3. New Homemaker and 4-H Clubs—

The policy is that no new uniracial clubs are permitted in biracial communities unless it can be shown that all reasonable efforts have been made to organize the club on an integrated basis. The agent working to organize the club will identify the geographic area from which the membership is expected to be drawn. Next, the racial make-up of the population in that area will be estimated. If there is a biracial composition to this population (one race less than 90 percent of the total) the club membership must be integrated or documented evidence shown that sincere but unsuccessful efforts were made to have an integrated membership. The documented evidence will be a statement by the agent showing: (a) that ten (10) individuals of the "other" race were given personal invitations to participate (including descriptions of the activities of the proposed club), (b) the names and addresses of these individuals, (c) the name of the person issuing the invitation to each person and (d) the date issued. The spirit of the policy on "invitations to join" is that it be personal (one-to-one) and not an announcement in the press or at a meeting, although this method may be used to supplement the personal invitation. In addition, the new club officers will certify the openness of the club to all races.

• • • • •

7. Altering the Nature of Segregated Clubs—

A program will be undertaken immediately to achieve a voluntary desegregation of all uniracial clubs in biracial communities. The program will involve members of the

administration and supervisory staff working with county staffs and the lay leadership in each county. The impact of the USDA Affirmative Action Program and the Alabama and Mississippi decisions will be explained. Voluntary desegregation will be requested. Multiple approaches will be suggested, such as: (a) combining clubs, (b) recruiting from the "other" race in the community, (c) joint meetings of clubs for educational programs, (d) restructuring two or more clubs in a given community, (e) finding "neutral" meeting places, (f) obtaining biracial teams of lay leaders to reinforce the efforts of the professional staffs to interpret the need for change and others.

Note: This is deleted from the 1974 Civil Rights Initiatives

GOVERNMENT EXHIBIT 184

AGRICULTURAL EXTENSION SERVICE

NORTH CAROLINA STATE UNIVERSITY
AT RALEIGH

SCHOOL OF AGRICULTURE AND LIFE SCIENCES

Agriculture Extension Service
Office of the Director
Box 5157, Zip 27607

May 3, 1974

TO: District Supervisors

Attached is a statement of civil rights initiatives which should be undertaken according to schedules included. These steps are those which have been decided upon following thorough discussions of our present status and needs. I appreciate the careful attention you have given to the development of this program and I am sure that you will carry forward in the same spirit with the responsibilities assigned to you in this statement. In doing so, I hope that you will make use of the services of those of us in the administration as appropriate.

Very truly yours,

George Hyatt, Jr.
Associate Dean and Director

GH:ms
Attachment
cc: Administration
Specialists in Charge

1974 CIVIL RIGHTS INITIATIVES

1. County 4-H Councils –

The status of the county councils should be reexamined. The 4-H staff will specify what is the appropriate representation on the Council. In those counties where the councils are inactive, they should be reactivated immediately. This should be accomplished by July 1, 1974, by the district teams. These counties will need assistance in making the council a meaningful entity. This will require more time but should be accomplished by June 30, 1975, by the combined effort of the district teams and the 4-H staff.

2. Functional Arrangement of Office Space, Telephone Numbers, Post Office Boxes, Mailing Lists and Assignment of Secretarial Work without Regard to Race –

Instances of the existence of non-functional arrangements should be eliminated by the district teams by July 1, 1974.

3. New Homemaker and 4-H Clubs –

The leaders and/or officers of all new Homemaker and 4-H Clubs will certify in writing that the club is open to all people without regard to race, color or national origin. In addition, the organization of the club will be announced to the public by radio and newspapers, including the approximate location or area served by the club, its purposes and the fact that it is open to all people without regard to race, color or national origin.

4. Work across Racial Lines –

It continues to be the policy of the North Carolina Agricultural Extension Service that our staff provides services to people without regard to race, color or national origin. Practices which impede the full implementation of this policy should be eliminated.

a. *Agents meeting with 4-H and Homemaker Clubs* –

District teams will ascertain by July 1, 1974, that agents are meeting with clubs without regard to race. Two agents (one White, one Black) meeting with a given club might be

a way to achieve this goal but will be viewed only as a means to the end of agents meeting with clubs in subject or program areas without regard to race.

b. *Leader recruitment and training* –

Leader recruitment and training will be done without regard to race by July 1, 1974. The affirmative requirements for dealing with the races should be a part of the initial training of leaders. This should be implemented during 1974 by the district teams.

c. *Referral of contacts* –

County chairmen will take steps to be sure that people who call at the county office by telephone or in person are referred to the agent whose areas of assignment are appropriate to the questions the caller has. This will require extensive discussion in staff meetings and special training for the secretarial staff. The district teams will see that this is accomplished in 1974.

d. *Specialists' contacts with county staffs* –

The administration will continue efforts to eliminate instances of specialists violating the spirit of assigned areas of responsibility. This was discussed at the Specialist-in-Charge meeting on April 26, 1974, and will be discussed again with all specialists at the meeting of state level people on May 24, 1974. Follow-up by the administration will continue with specialists who commit acts, intentional or otherwise, which violate the spirit of the assigned areas of county staff members.

e. *Pattern of contacts by staff* –

Each county staff member will analyze his or her pattern of contacts by race based on SEMIS. This will be compared with the potential clientele for the relevant program areas. The county and district chairmen will make a review of contacts by race a part of the annual performance review process beginning in 1974-75.

5. Reaching Minority Race People –

Each county shall analyze the extent to which they as a total staff are reaching Blacks and Indians in the latest

period for which SEMIS data is available (July-December 1973 or July 1973-June 1974) as compared with the total potential clientele for each program area (Agriculture, Home Economics, 4-H, Community Resource Development and Environmental Quality). The county staff will estimate the racial mix for each program area based on county population data, numbers of farmers, etc. In counties with large urban areas, different weights might be put on the urban population, depending on the extent of urban programming. Estimates will be added for program aides who do not report on SEMIS. For those program areas in which contacts by race are less than 80 percent of the potential clientele percentage (for example, less than 8 percent if the minority race potential is 10 percent or less than 32 percent if the minority race potential is 40 percent), a plan will be developed to increase the percentage of Blacks or Indians contacted. This plan will state (a) what will be done, (b) who will do it, (c) when it will be done, and (d) the specific result expected to be achieved. The 80 percent variance should not be considered a goal. The goal shall be to serve minority race people at least in relation to their percentage of the potiential clientele. This principle should be considered in setting the goal expected in (d) above. District teams will review the county analyses before December 31, 1974, and anually thereafter.

6. Judging State and District Demonstrations—

Beginning in 1974 and continuing thereafter 25 percent of the judges for district and state demonstrations will be from minority races. The responsibility for this rests primarily with the specialist responsible for administering the demonstration. Each such specialist shall comply with the 25 percent requirement by combining the judging teams for the districts with that for the state and computing the percentage by race. However, the state judging team should include one or more persons from minority races. The 4-H office will assist specialists in meeting this requirement.

GOVERNMENT EXHIBIT 191

NORTH CAROLINA STATE UNIVERSITY
SCHOOL OF AGRICULTURE AND LIFE SCIENCES

Agricultural Extension Service
Office of the Director
Box 5157 Zip 27607

March 31, 1977

TO: D. G. Harwood, Jr.
Donald L. Stormer

FROM: Chester D. Black

At the last District Chairmen's conference we discussed briefly the Affirmative Action requirements for organization of new 4-H and Extension Homemakers clubs. Following this conference Dr. Stormer shared his desired documentation to be followed in the formation of new 4-H clubs. Almost simultaneously Mrs. Meldau brought to our attention the Civil Rights Initiatives shared with our staff in 1974. Under the heading of New Homemaker and 4-H Clubs there are listed the requirements which were given to the agents at that time.

Since we have a discrepancy between the two documentations currently requested, I would appreciate you gentlemen assisting our staff in an interpretation of what should be the current status regarding Affirmative Action initiatives being taken by our field staff in the formation of 4-H and Homemaker clubs.

CDB:ms

GOVERNMENT EXHIBIT 192

April 4, 1977

Dr. Chester D. Black
110 Ricks Hall
NCSU Campus

Dear Dr. Black:

In your memorandum of March 31 you asked the two of us to interpret the current status of affirmative action initiatives to be followed by field staff in the formation of 4-H and Homemaker clubs.

At a meeting on January 6 of Mr. Howard Manning, Dr. Hyatt, Dr. Blalock, Mr. Dodson and Mr. Harwood, acting on the advice of counsel, Dr. Hyatt stated that it shall be the policy of the N.C. Agricultural Extension Service to take necessary steps to avoid all discrimination in delivery of services, but that unnecessary record-keeping, delineation of geographical boundaries, physical counting of population in a community and other affirmative action chores which require tremendous amounts of staff time should be avoided. At that time it was noted that a formal, complete affirmative action plan would require an estimated $6-$8 million in staff time. Also, counsel advised that a court order resulting from the civil rights suit would likely require steps in addition to any affirmative action measures then being implemented anyway.

In view of this decision, knowing that the N.C. Agricultural Extension Service is essentially "sheltered" from discrimination issues until the pending litigation is settled, and yet because our understanding is that violation of the various civil rights laws can be charged eventually against any employee who cannot document compliance, we offer the following suggestions:

1. *If we are asked what affirmative action requires*[1] in formation of new 4-H and Homemaker clubs, then the correct response is to "make reasonable efforts" to integrate these units, basically as defined in Dr. Stormer's memo of March 25, 1977.

2. *If we are asked what the policy of the North Carolina Agricultural Extension Service is with respect to affirmative action,* then reference must be made to the "1974 Civil Rights Initiatives" which were agreed upon by Administration and which were attached to Mrs. Meldau's memo of March 29, 1977.

Sincerely,

Donald L. Stormer
Assistant Director, 4-H

D. G. Harwood, Jr.
Assistant Director,
Administration and Special
Programs

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[1] See "Title 9, Equal Opportunity Administrative Regulations," USDA, November 18, 1976.

GOVERNMENT EXHIBIT 193

AGRICULTURAL EXTENSION SERVICE

NORTH CAROLINA STATE UNIVERSITY
AT RALEIGH

SCHOOL OF AGRICULTURE AND LIFE SCIENCES

Office of the Director
Box 5157, Zip 27607

April 18, 1978

TO: All County Extension Chairmen

SUBJECT: Meeting Structure for Extension Homemakers

The new Extension Homemaker meeting structure, approved by the Extension Homemakers State Organization, is now policy for the N. C. Agricultural Extension Service and the new meeting structure will begin on October 1, 1978. Details of this new meeting arrangement were discussed during March at district level meetings of County Chairmen, Home Economics Agents with Extension Homemaker liaison responsibilities, and presidents of Extension Homemaker County Councils.

Basically, the restructuring will result in the following Extension Homemaker meeting schedule:

1. Three area meetings with lessons conducted by Extension Home Economists during three quarters of the year.
2. One meeting during a quarter of the-year when the Extension Home Economist will meet with each club.
3. Eight local Extension Homemaker Club meetings with lessons presented by volunteer leaders, with prior training by appropriate Home Economics Agent.

In order to document the procedures for implementing this policy, please ask the Extension Home Economist with liaison for Extension Homemakers, working with the

District Program Leader, Home Economics, to submit to Dr. Eloise Cofer by September 1, 1978, the following documents:

1. County map, identifying location of clubs, location of area meeting boundaries.
2. Listing of club membership by area, indicating race of members and race of potiential clientele.
3. Meeting schedule planned, listing program features, dates, locations.
4. Copies of any public notices of new meeting schedule (newsletters, news articles, radio scripts).
5. Narrative statement of procedures followed in restructuring Extension Homemakers meetings, identifying any planning committees with respect to race of members.

I am confident that this new policy will result in increased Extension Homemakers membership, better meetings, more efficient use of agents' time and closer compliance with affirmative action regulations.

Thank you.

Very truly yours,

George Hyatt, Jr.
Associate Dean and Director

cc: Extension Administration
District Chairmen
District Program Leaders
Home Economics Specialists-in-Charge

GOVERNMENT EXHIBIT 194

April 25, 1978

Mr. Howard Manning, Sr.
Manning, Fulton & Skinner
P.O. Box 1150
Raleigh, N.C. 27602

Dear Mr. Manning:

The attached copy of a letter from Dr. George Hyatt outlines a new policy for the Extension Homemakers meeting structure as conducted by the Extension Home Economists of the N.C. Agricultural Extension Service. This arrangement has implications for civil rights, and we have tried to inform County Extension Chairmen, Extension Home Economists and Extension Homemaker officers of the need for grouping Homemaker clubs according to township boundaries so that race of members and race of potential clientele can be documented. There are some other very good reasons why the Extension Homemaker meeting structure is being changed, but I did want you to know what we are doing because of the implications for civil rights.

Sincerely yours,

D. G. Harwood, Jr.
Assistant Director

Enclosures

GOVERNMENT EXHIBIT 195

September 4, 1979

TO: Dr. T. C. Blalock

FROM: D. G. Harwood, Jr.

You will recall that as long as Dr. Hyatt was Director of the N.C. Agricultural Extension Service, he refused to allow implementation of one of the "all reasonable effort" guidelines suggested in "Guidelines for Identification of Potential Recipients in State Cooperative Extension Service Programs." That provision was to "Make personal contact annually with minority group members to inform them of programs and to encourage their active participation." Dr. Hyatt agreed to allow implementation of "use of mailing lists for minority group members to receive information on a continuing basis, extend invitations through letters, newspapers and so forth to minority group members to attend and participate, direct information on programs and activities to sources of business and social contacts of minority group members, identify and utilize various mass media outlets which serve to disseminate information to minority group members, and maintain documentation of these efforts to involve minority group members."

I understand that Extension Homemakers, with assistance from Extension Home Economics Agents, will shortly be launching a membership drive throughout the state to increase greatly the numbers of Extension Homemakers. I am wondering how you feel about now implementing the provision regarding personal contact with minority group members to inform them of programs and to encourage their active participation in Extension Homemaker and 4-H activities. I personally feel that this next step will be required to satisfactorily comply with

affirmative action mandates. It may be that the personal contacts could be made by Extension Homemakers rather than by Home Economists. However, you yourself realize that often participation is not encouraged through simply notifying minorities through mass media outlets. I recognize that this implementation would require some additional time and travel. However, since this contact could be made over a period of a year, it seems to me that the contacts could be made in connection with other trips out in the county and would not require an undue amount of time and travel. Also, it could only be implemented in areas where new clubs were being formed, so this restriction alone could keep the time and travel within manageable levels.

I will await your instructions in this regard.

GOVERNMENT EXHIBIT 198

NORTH CAROLINA STATE UNIVERSITY SCHOOL OF AGRICULTURE AND LIFE SERVICES

Agricultural Extension Service
Office of the Director
Box 5157 Zip 27650

November 14, 1979

Mr. Howard E. Manning, Sr.
Manning, Fulton & Skinner
P. O. Box 1150
Raleigh, NC 27602

Dear Mr. Manning:

Thank you for your letter of November 7, 1979, enclosing documents which you recently filed in reference to Bazemore vs. N. C. Agricultural Extension Service (your file G-6778). On page 4 of the Defendant's Answer to Amended Complaint in Intervention and in paragraph 14 it is stated that the defendant Dr. George Hyatt, Jr., is the Director of the N. C. Agricultural Extension Service. You will recall that Dr. T. C. Blalock was named Director of the N. C. Agricultural Extension Service on July 1, 1978. I don't know whether this makes any difference or not and whether or not this should be corrected, but since you mention in paragraph 13 on page 3 that John T. Caldwell has not been Chancellor of N.C. State University for several years, I thought I should bring this oversight to your attention.

I will be contacting you again in a few days in order to ascertain whether or not you feel certain publication distribution and implementation of all reasonable efforts is in the best interest of the N.C. Agricultural Extension Service, given the current state of the Civil Action No. 2879.

Sincerely,

D.G. Harwood, Jr
Assistant Director,
Agriculture and
Special Programs

cc: Dr. Clauston Jenkins
Dr. T. C. Blalock

GOVERNMENT EXHIBIT 199

November 15, 1979

Mr. Howard Manning, Sr.
Manning, Fulton & Skinner
P. O. Box 1150
Raleigh, NC 27602

Dear Mr. Manning:

At a recent meeting of our Administrative Council, the Administration of the North Carolina Agricultural Extension Service voted to begin implementation of "all reasonable efforts" in delivery of Extension programs of this state, with particular emphasis on "personal visits by the county Extension staff member(s) to a representative number of defined potential recipients in the geographically defined area to encourage participation."

We do not want to take this step if it will in any way compromise our position in the pending civil action against our organization. Do you feel that our actions on "all reasonable efforts" would be detrimental to our case at this time?

Also, enclosed is a copy of *Strengthening 4-H Programs Through Affirmative Action* (Discussion of "All Reasonable Efforts" on pages 20-23). Would you advise against our distributing this publication to each county office?

Thanks for your help.

Sincerely,

D. G. Harwood, Jr.
Assistant Director, Agriculture
and Special Programs

cc: Dr. T. C. Blalock
Dr. Clauston Jenkins
Mr. Millard Rich

GOVERNMENT EXHIBIT 200 (EXCERPTS)

* * * * *

STRENGTHENING 4-H PROGRAMS THROUGH AFFIRMATIVE ACTION

* * * * *

SECTION V/ "All Reasonable Efforts"

The philosophy of taking educational program services to the unserved by seeking them out and providing them with program information, assistance and benefits is germane to the issues presented in this section. In spite of the fact that the Cooperative Extension Service has successfully served its clientele through various educational programs for over 60 years, the question of reaching the unreached is particularly significant to the nonparticipation problem of minority group members.

The question of involvement and increased participation of minorities in Extension educational programs has led to suggested practical steps which can be taken to meet both the 4-H program and affirmative action program requirements. The intent in the application of "all reasonable efforts" is a program management tool. Efforts outlined here will result in an informed public and encourage them to participate.

Question 40: What is meant by "all reasonable efforts" with respect to the 4-H program?

Answer: The term "all reasonable efforts," as used in the Affirmative Action Plan, applies to organized Extension Homemaker Groups and 4-H Clubs. The *minimum reasonable* effort required by *county Extension staff members* includes all items listed as follows:

• Use of all available mass media, including radio, newspaper, and television, to inform potential recipients of the program and of opportunity to participate.

• Personal letters and circulars addressed to defined potential recipients inviting them to participate, including dates and places of meetings or other planned activity.

• Personal visits by the county Extension staff member(s) to a representative number of defined potential recipients in the geographically defined area to encourage participation.

State Extension Services may require additional steps to be taken such as encouraging volunteers to assist by involving potential recipients in opportunities to participate, but such additional steps *are not required* by USDA in meeting these requirements. If a State requires additional steps to be taken, then the State should be explicit and point out that such is a State requirement. (The greatest results will be obtained when these reasonable efforts are carried out in conjunction with upcoming or planned activities. An invitation extended in a vacuum, without some activity scheduled, will yield little motivation.

Question 41: Who is responsible for "all reasonable efforts" and what documentation is expected to show that these have been carried out?

Answer: The State Cooperative Extension Service, as the recipient agency to whom federal financial assistance is extended, is responsible and accountable for all civil rights matters in 4-H Clubs and the 4-H youth development program. Therefore, the Affirmative Action Plan specifically identifies the *county Extension staff* member(s) as those responsible for carrying out "all reasonable efforts." However, county Extension staff members may solicit the *voluntary assistance* of lay leaders, officers of clubs, etc., to carry out these efforts. In this latter case, the county Extension staff should provide procedures, materials and forms to lay leaders and others for recording and reporting to the county Extension office the "all reasonable efforts" which were carried out.

All activities conducted as a part of the 4-H youth development program which involve participation should be documented and available in the county files for review purposes. Insofar as "all reasonable efforts" are concerned, "if it isn't documented, it wasn't done."

Using "all reasonable efforts" for documentation purposes, the following records appear obvious:

Use of Available Mass Media

• Name of radio station(s) used; dates on which programs were personally presented; dates on which radio scripts were provided to the station for airing; copies of any radio scripts which were used with personal presentation.

• Name of TV station(s) used; dates on which programs were presented and dates aired, if different; copies of scripts, when used; copies of any scripts which were provided to the station(s).

• Name of newspapers; dates on which news articles were presented to papers and copies of articles presented for publishing; dates on which articles appeared in newspaper; clippings of such articles; date and identity of newspaper(s) which released article.

Personal Letters and Circulars

• Copies of such letters and circulars in the file.

Names of persons to whom such letters and circulars were sent.

Personal Visits

• Names and addresses of persons visited; dates of such visits; names of persons present during the visits.

• Resume of significant contents of visit and followup needed; and outcome of visit in terms of desire to participate or lack of interest; other important information thought desirable.

Question 42: What are the bases for determining if "all reasonable efforts" have been carried out?

Answer: Verify, through review of county office records, the documentation to ascertain the adequacy of the actions which were recorded, and evaluate the extent to which the "all reasonable efforts" were completed. County Extension staff should verify by occasional contact with those purported to have been communicated with. Monitoring of radio and TV airings as well as news releases serves as a useful criterion in evaluation.

Question 43: How do "all reasonable efforts" apply to established 4-H Clubs? To new 4-H Clubs?

Answer: The concept of "all reasonable efforts" and its criteria apply to all 4-H Clubs established presently in an ongoing county 4-H program. In organizing new 4-H Clubs in interracial communities, the "all reasonable efforts" must be carried out during the process of organizing. This process provides opportunity for youth of all races to become members. Only after the criteria of "all reasonable efforts" have been met may a new club be organized in interracial locales.

Such steps are simply good program development procedure.

Question 44: How often must "all reasonable efforts" be carried out?

Answer: After the "initial" efforts are completed (six months following acceptance of plan), a continuing plan of action based upon effective program planning procedures and an effective public information and communications program should be developed and implemented. A continuing plan should focus upon these 4-H situations where the initial efforts were unproductive. It should correlate the "all reasonable effort" requirements with the various program plans and strategies, including annual plans for Targeting of Minority Benefits.

Involve all public pronouncements of program participation opportunities through various mass media sources and outlets in keeping with the provisions of the public notification plan. Personal visits (by agent, leader, officers or others) to prospective minority members should be tied very closely to some planned program activity, perhaps unique to a club or several clubs where participation can occur almost immediately with appropriate followup plans by agents or leaders. A membership promotional program such as National 4-H Week or other appropriate observance which includes these and other efforts to attract membership can be effective instruments in meeting these requirements on a continuing basis.

Question 45: If there are ten (10) 4-H clubs in a delineated geographic area and very few of these clubs have interracial membership, but overall the clubs' membership represents the general makeup of the community, do these clubs meet affirmative action requirements?

Answer: There may be situations in high density urban areas when this question could be answered affirmatively. Generally, the above situation as described does not meet the interracial membership requirements of each club in a geographic area, particularly where minority youth are scattered throughout the community. (See Standard 1, Action Required, 1, b and c, pp. 34 and 35 of the Affirmative Action Plan.)

Each of those clubs whose membership is of one race and serving an interracial community must comply with the "all reasonable efforts" to integrate its membership before it can meet the affirmative action requirements.

* * * * *

Question 59: In what types of circumstances must Extension withdraw its services from a 4-H Club; the 4-H program; or a total county 4-H program?

Answer: Legally speaking, any circumstance which violates regulations for the administration of Title VI of the Civil Rights Act of 1964 can be grounds for the termination of services by the Cooperative Extension Service. The following situations are examples only of the range of possibilities. Any organization with whom Extension works, including a 4-H Club, which discriminates and/or restricts membership and participation or provides services differently or in a different manner, or segregates, based on race, color or national origin, are grounds for removal of services by Extension.

Any 4-H Club whose membership is of one race and serving an interracial community or area must make "all reasonable efforts" to integrate the membership. Service to such clubs must be terminated if the membership remains of one race and "all reasonable efforts" are not carried out. Similar circumstances would precipitate this same action for new clubs being organized.

Termination of services may occur on a county basis if the 4-H program in that county is conducted in a discriminatory manner. The conduct of educational activities and events which are, or have the effect of being, segregated, restricted, provided differently or in a different manner, or which deny participation based upon race, color or national origin, may cause the termination of services.

In a county where the practice of discrimination is severe and voluntary compliance with Title VI of the Civil Rights Act of 1964 is not possible, may be sufficient grounds for removal of the total Extension program from that county.

Non-compliance with the provisions of the affirmative action plan, or any one of its provisions, may serve as the basis for the termination of services.

* * * * *

GOVERNMENT EXHIBIT 201

NORTH CAROLINA STATE UNIVERSITY
SCHOOL OF AGRICULTURE AND LIFE SCIENCES

Agricultural Extension Service
Office of the Director
Box 5157 Zip 27650

February 29, 1980

TO: Dr. T. C. Blalock

FROM: D. G. Harwood, Jr.

Yesterday I was finally able to talk at length by telephone with Mr. Howard Manning, Sr., regarding our proposal to implement "all reasonable efforts" in our Extension program. Mr. Manning says he is not unalterably opposed to our implementing "all reasonable efforts," but he feels that it would not be in our best interest. He pointed out that we have implemented an affirmative action program informally except for the "all reasonable efforts" provision. He says that by stratifying communities geographically, we will first of all lower the standards for our program inasmuch as we will be forced to accept 4-H Club members, for example, who may not have the interest or talent to participate in club activities. He says we will have to adapt our program more toward federal guidelines; but, more importantly, he says that this really provides the foundation for a civil action suit by the Justice Department who may point out that, "Okay, you structured communities for integrated clubs and you are not achieving the level of integration projected; therefore, you are not in compliance."

Mr. Manning says that he has based our entire defense on the fact that the N. C. Agricultural Extension Service has been trying—within its own system—to voluntarily achieve integration throughout its programs. He says we can substantiate that this change has occurred over time and that, whereas if we had tried to force the change through a rigid affirmative action program, that we would have simply lost the 4-H and home economics programs, as some other states have. He says we have tried to use judgment in determing how fast we could move and where we had to yield in order to maintain ongoing programs. He says the judge understands this and that now if we try to implement an "all reasonable efforts" program, then what we will be in effect doing is saying to the judge that we were not successful in this and now we are trying to set up a program to bring about forced change in our programs. He says this would defeat the foundation that he has been using for our defense.

You will need to weigh this feeling and decide, but I am inclined to agree with Mr. Manning that perhaps we should not implement the "all reasonable efforts" provision right now. Not only would there be a lot of resistance in our communities among clientele for this type of approach, but even within our own organization there is going to be a lot of dissension. Both Mr. Manning and I feel that ultimately we will be forced to get into the "all reasonable efforts" program, but perhaps it might be best to wait until our civil action is resolved. I will abide by your decision in the matter.

cc: Dr. Black

GOVERNMENT EXHIBIT 214

July 6, 1973

Dr. J. T. McCown
Associate Dean for Extension
University of Florida
Gainesville, Florida 32601

Dear Dr. McCown:

Dr. Blalock asked me to write you and send some information which we have on professional salaries in our organization. I have two pieces of information, both of which are based on the salaries that existed in the 1971-72 fiscal year.

The first is a multiple regression of the salaries of our full agents (not including chairmen) which assessed the effect on salaries of (a) a master's degree, (b) race, (c) sex and (d) experience. The results were as follows:

Value of a master's degree	$605
Amount of salary of blacks under salary of whites	$455
Amount of salary of women under salary of men	$663
Value of 10 years' experience	$653

The other piece of information shows average salaries for categories of agents identified by race, sex and rank. I believe that this table and this supplementary information

are self explanatory. The second page gives a good bit of detailed information about the groups—tenure, education, etc.

Please let me know if you have any questions about this information.

Sincerely yours,

George L. Capel
Assistant Director, Marketing
and Special Programs

GLC:ms
cc: Dr. T. C. Blalock
Enclosure

DEFENDANTS' EXHIBIT 78 (EXCERPT)

MEMORANDUM OF UNDERSTANDING BETWEEN THE N. C. AGRICULTURAL EXTENSION SERVICE-NORTH CAROLINA STATE UNIVERSITY AND THE BOARD OF COUNTY COMMISSIONERS

* * * * *

The North Carolina Agricultural Extension Service was established as a part of the School of Agriculture and Life Sciences of North Carolina State University by Federal and State legislation for the specific purpose of "extending" the educational service of the University to the people of the State on subjects relating to agriculture, home economics, 4-H and youth, community and natural resource development. It is the principal means by which the findings of research in these subjects are communicated to the people.

This legislation provided that Cooperative Extension work be a partnership between three levels of government—Federal, State, and County—with these levels being officially represented by the U.S. Department of Agriculture, North Carolina State University and the County Boards of Commissioners. By this arrangement County Extension Agents are joint employees of North Carolina State University and the Board of County Commissioners. They are also official representatives of the United States Department of Agriculture.

To assure maximum benefits of this educational service to the people it is important that the elected and appointed officials of each level of government understand their respective responsibilities and the relationships in the conduct of this work. It is to this end that the following description of responsibilities and relationships was developed.

RESPONSIBILITIES AND RELATIONSHIPS

The North Carolina Agricultural Extension Service will:

1. Provide the State proportionate share of salaries for County Extension personnel. The salaries of all workers will be determined jointly by the Agricultural Extension Service and County Boards of Commissioners, and the proportionate share paid by the State and by the County will be determined by the above two parties.

2. Provide funds for official travel necessary in the conduct of Extension work to the extent that funds are available and for purposes authorized by State and Federal policies.

3. Accept responsibility for:

a. Establishing minimum requirements and qualifications for employment in Extension work.

b. Receiving and examining applications for employment.

c. Interviewing and otherwise investigating applicants to determine their qualifications and availability.

d. Recommending to the County Commissioners, for their consideration, qualified applicants for appointment to vacant or new Extension positions.

4. Prepare and submit an annual budget request to the Board of County Commissioners for the County's proportionate share of funds for the total operating budget.

5. Provide County Extension agents with official envelopes, bulletins, leaflets, and other publications.

6. Accept responsibility and provide the leadership for administration and supervision of Extension programs and personnel, including compliance with the requirements of the Civil Rights Act of 1964 applicable to the Cooperative Extension Service.

7. Provide a staff of specialists to continuously train agents in current technology and other changes affecting

agriculture, home economics, 4-H and youth, community and natural resource development and to assist them in the conduct of work in these areas.

8. Provide agents with individual on-the-job training by Extension specialists and district agents and plan and arrange for such group training programs and activities as are deemed advisable.

The Board of County Commissioners will:

1. Provide the County's proportionate share of salaries for the County Extension personnel. The salaries of all workers will be determined jointly by the Board of County Commissioners and the North Carolina Agricultural Extension Service.

2. Provide office space and equipment, utilities, telephone, office supplies, and demonstration materials needed for efficient operation of the County Extension Office and program.

3. Review and consider the annual budget request from the Extension Service and take appropriate action by July 1 of each fiscal year.

4. Confer and advise with the District and County Extension agents and Extension Advisory Boards relative to county Extension programs.

The North Carolina Agricultural Extension Service and the Board of County Commissioners mutually agree:

1. That all County Extension appointments and separations are to be worked out jointly by the North Carolina Agricultural Extension Service and the Board of County Commissioners, and that no official action will be taken by either party regarding appointment or separation prior to discussion of the matter with the other party.

2. That the policies established by the State of North Carolina and followed by the University be used as a guide in granting annual, sick, civil, and military leave for County Extension personnel.

3. To cooperate in meeting the requirements of the Civil Rights Act of 1964.

4. That the policies of North Carolina State University relative to the classification of employees will apply to all County Extension workers; therefore, they will not be classified under a county classification system.

5. That County Extension agents will be guided by County policies relative to office hours and holidays.

We are in agreement with the above description of the responsibilities and relationships, and that this memorandum of understanding may be reviewed at any time but shall be reviewed once each four years.

Date: _____ _____, *Chairman*

Board of _____
County Commissioners

Date: _____ _____, *Director*
North Carolina Agricultural
Extension Service

* * * * *

DEFENDANTS' EXHIBIT 196

SOUTHWESTERN	71/72%	1981	1976	1971
Alexander	40.72	25,089	16,730	14,263
Anson	31.08	21,000	18,080	13,474
Burke	47.86	27,152	18,303	14,040
Cabarrus	45.22	26,814	18,319	13,862
Caldwell	46.82	27,884	18,686	13,412
Catawba	41.27	28,788	18,537	14,619
Cleveland	36.87	27,204	18,801	13,600
Gaston	43.09	29,551	18,942	14,416
Iredell	39.12	30,901	20,574	14,308
Lincoln	41.36	26,391	16,754	15,339
Mecklenburg	52.42	29,500	19,150	13,975
Montgomery	36.56	26,000	18,471	12,742
Moore	48.50	24,185	17,610	12,752
Richmond	30.74	25,882	17,571	13,349
Rowan	39.25	27,871	21,622	15,976
Stanly	42.53	23,721	17,211	16,030
Union	36.65	31,004	17,500	14,760
TOTALS				
NORTH CENTRAL				
Chatham	35.95	28,116	18,940	13,910
Durham	39.60	27,015	18,375	13,375
Edgecombe	43.42	27,843	18,648	13,710
Franklin	27.69	24,842	17,023	13,106
Granville	38.22	30,402	Vacant	12,827
Halifax	42.73	31,177	19,159	14,596
Harnett	43.13	26,480	16,796	12,500
Johnston	44.20	33,765	21,217	15,145
Lee	35.93	21,584	17,680	13,008
Nash	40.36	25,990	17,135	12,936
Northampton	31.40	33,915	17,136	16,208
Orange	40.94	27,193	18,033	13,940
Person	27.85	26,045	18,480	13,206
Vance	37.01	22,740	18,325	13,466
Wake	44.30	29,458	21,800	16,588
Warren	29.73	24,244	17,730	13,400
Wilson	44.25	30,656	20,632	15,984
TOTALS				

WESTERN	71/72%	1981	1976	1971
Avery	8.27	22,500	17,800	11,621
Buncombe	33.18	32,681	21,595	14,806
Cherokee	26.26	26,141	17,784	12,314
Clay	12.11	20,000	17,350	12,421
Graham	31.45	25,581	16,500	12,918
Haywood	29.53	27,968	18,028	14,350
Henderson	34.00	29,561	18,203	13,301
Jackson	40.32	Vacant	19,350	13,170
Macon	30.25	29,459	18,400	12,806
Madison	18.21	27,546	18,300	12,596
McDowell	35.11	21,459	17,229	13,088
Mitchell	14.29	22,630	18,200	13,146
Polk	36.71	23,134	17,955	12,960
Rutherford	44.51	27,300	19,114	13,878
Swain	18.90	21,725	17,678	13,230
Transylvania	40.02	25,581	17,424	11,670
Yancey	18.76	25,323	17,350	12,043
TOTALS				
NORTHWESTERN				
Alamance	45.37	24,861	17,634	15,386
Alleghany	23.72	22,718	17,180	12,500
Ashe	26.94	21,052	16,276	12,198
Caswell	29.91	21,156	16,453	12,554
Davidson	45.33	29,067	19,328	15,474
Davie	30.13	29,492	18,283	13,575
Forsyth	53.46	30,155	22,243	16,230
Guilford	47.41	32,120	21,364	16,392
Randolph	46.42	31,384	17,655	13,924
Rockingham	50.68	27,592	21,860	16,646
Stokes	35.54	20,500	17,065	13,450
Surry	42.36	27,000	18,741	14,590
Watauga	26.38	24,762	16,993	13,728
Wilkes	39.44	26,530	18,977	14,667
Yadkin	30.59	27,270	16,646	13,388
TOTALS				

NORTHEASTERN	71/72%	1981	1976	1971
Beaufort	31.68	27,254	17,139	12,838
Bertie	23.96	25,275	16,484	13,001
Camden	15.96	25,285	16,356	11,726
Chowan	16.97	23,500	29,465	14,811
Craven	50.20	26,291	17,097	13,079
Currituck	28.40	26,292	18,337	12,868
Dare	22.12	23,260	16,028	11,601
Gates	18.16	29,564	19,209	12,355
Hertford	24.53	28,381	17,194	13,264
Hyde	18.85	28,490	18,284	12,682
Martin	40.58	29,426	18,805	13,143
Pamlico	20.82	23,000	18,189	13,243
Pasquotank	29.44	31,506	17,998	13,054
Perquimans	18.63	21,807	16,383	12,828
Pitt	43.32	27,556	19,848	14,581
Tyrrell	14.77	26,939	17,284	12,500
Washington	21.36	29,488	12,582	12,899
TOTALS				
SOUTHEASTERN				
Bladen	32.02	25,536	19,678	13,661
Brunswick	32.35	25,513	16,900	13,280
Carteret	37.56	27,655	17,806	13,227
Columbus	32.21	27,766	16,968	13,913
Cumberland	47.77	37,044	18,934	14,223
Duplin	30.85	26,878	18,615	14,156
Greene	30.31	26,860	18,000	12,792
Hoke	32.63	22,008	17,674	13,618
Jones	19.71	28,183	18,470	13,080
Lenoir	35.37	34,558	23,931	12,582
New Hanover	38.83	28,898	20,024	14,702
Onslow	39.19	24,783	14,422	12,524
Pender	27.57	25,295	16,871	12,252
Robeson	40.50	28,250	19,302	14,970
Sampson	37.27	34,577	19,490	13,862
Scotland	43.45	25,764	16,756	12,914
Wayne	44.14	28,962	21,532	16,278
TOTAL				

DEFENDANTS' EXHIBIT 201

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE
December 1976 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	102	12,924	8.3	91	12,821	7.7	11	13,772	13.0
White	387	13,054	9.8	294	12,698	9.3	93	14,181	11.5

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

DEFENDANTS' EXHIBIT 202

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE
February 1979 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	117	14,826	10.2	88	14,838	10.8	29	14,792	8.4
White	380	15,085	8.8	291	14,693	8.0	89	14,683	8.0

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

DEFENDANTS' EXHIBIT 203

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE
November 1979 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	110	15,631	10.4	89	15,653	10.2	21	15,537	11.2
White	382	16,071	9.2	284	15,630	8.5	98	17,349	11.1

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

DEFENDANTS' EXHIBIT 204

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE
April 1980 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	103	16,010	10.4	84	15,773	10.1	19	17,060	11.9
White	367	16,050	8.7	271	15,649	8.2	96	17,182	10.4

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

DEFENDANTS' EXHIBIT 205

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE
April 1981 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	91	18,420	12.6	75	18,180	12.1	16	19,549	14.8
White	373	18,180	10.3	277	17,711	9.5	96	19,532	12.4

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

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DEFENDANTS' EXHIBIT 219

TRENDS IN THE NORTH CAROLINA 4-H PROGRAM
1971-80

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980
Members in:										
4-H Clubs	38,491	37,763	37,246	38,393	36,776	35,697	33,730	34,191	33,103	32,970
4-H Special Interest	26,648	31,544	44,588	57,196	53,864	57,711	64,224	62,854	76,036	62,483
4-H T.V.	71,442	99,147	123,769	103,718	None	92,172	2,621	None	None	133
Total (excluding TV)	65,139	69,307	81,834	95,589	90,640	93,408	97,954	97,045	109,139	95,453
Total (including TV)	136,581	168,454	205,603	199,307	90,640	185,580	100,575	97,045	109,139	95,586
Units:										
4-H Clubs	1,876	1,747	1,748	1,844	1,786	1,714	1,731	1,730	1,714	1,665
Special Interest Groups	**	840	1,109	1,338	1,469	1,584	1,337	1,518	1,851	1,783
Total Units:	1,876	2,587	2,587	3,182	3,255	3,298	3,068	3,248	3,565	3,448

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[CONTINUED NEXT PAGE]

DEFENDANTS' EXHIBIT 219 – Continued

TRENDS IN THE NORTH CAROLINA 4-H PROGRAM

1971-80

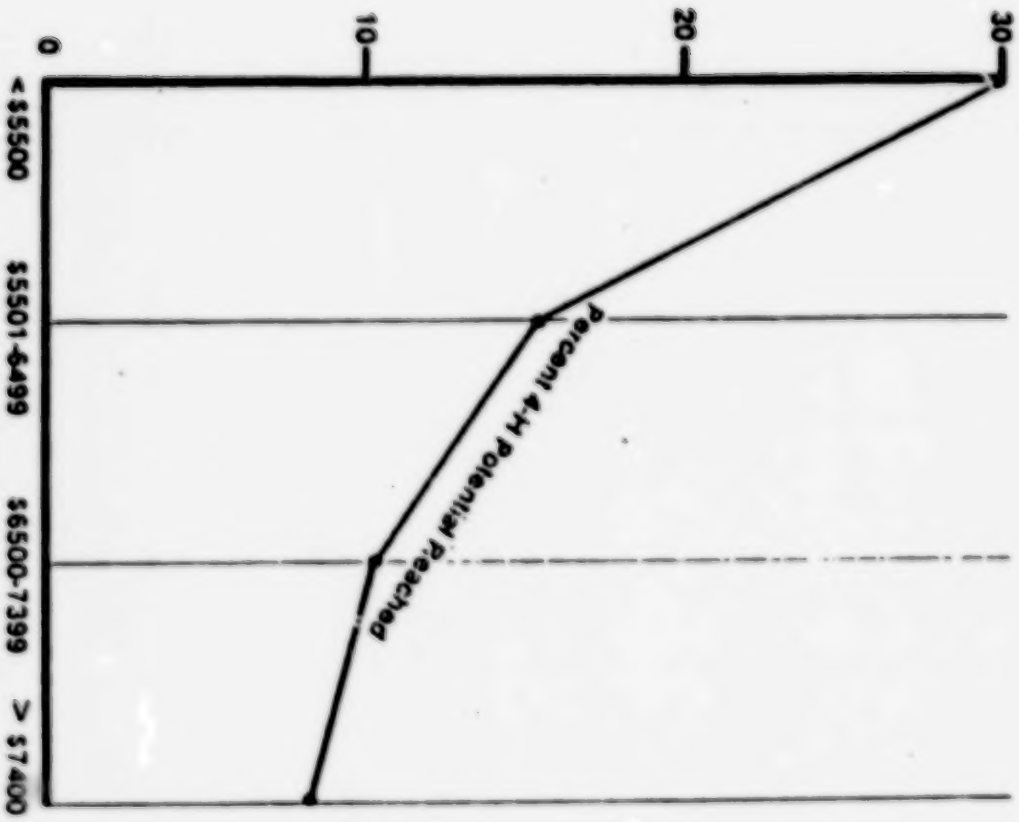
	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980
Leaders:										
Adult Leaders	7,407	6,472	7,270	7,932	8,777	9,363	10,522	11,213	12,408	12,607
Junior Leaders	2,599	2,323	2,390	2,393	2,591	2,702	2,602	2,993	3,172	2,671
	10,006	8,795	9,660	10,325	11,368	12,065	13,124	14,206	15,580	15,278
•*Place of Residence:*										
% Farm	37%	31%	32%	29%	28%	26%	22%	21%	21%	24%
% Towns under 10,000	48%	50%	50%	50%	49%	51%	50%	50%	49.7%	52%
% Cities 10,000 to 50,000	11%	9%	12%	11%	14%	13%	11%	11%	10.5%	14%
% over 50,000	4%	10%	7%	10%	10%	10%	17%	18%	18.8%	10%

•Data base is membership in 4-H clubs and special interest groups

••Not reported

DEFENDANTS' EXHIBIT 221

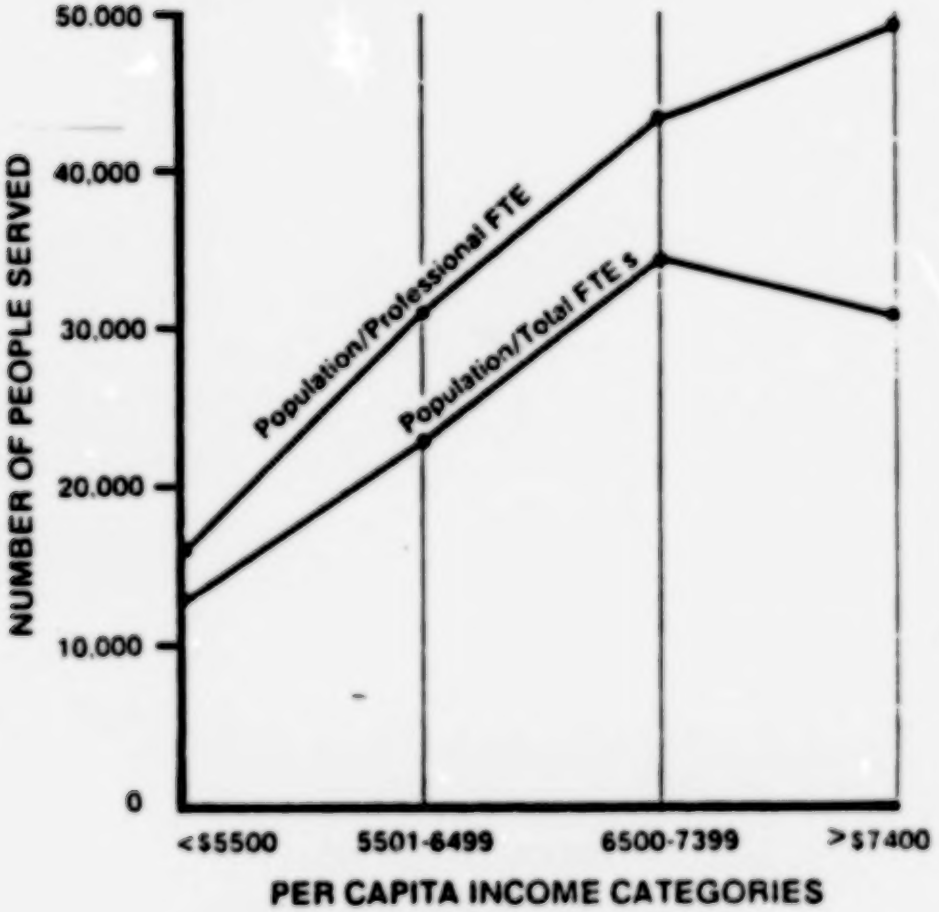
PERCENT OF POTENTIAL YOUTH AGES 9-19 REACHED WITH 4-H PROGRAMS FOR COUNTIES GROUPED BY SELECTED CATEGORIES OF PER CAPITA INCOME



Sources: 1980 ES-237 Report
1980 Census of Population
1980 Records of District Extension Chairman

DEFENDANTS' EXHIBIT 222

NUMBER OF PEOPLE SERVED BY EXTENSION 4-H STAFF, PROFESSIONAL AND TOTAL (INCLUDES PARAPROFRESSIONAL) IN COUNTIES GROUPED BY SELECTED CATEGORIES OF PER CAPITA INCOME



Sources: 19 ,0 Census of Population
1980 ES-237 Report
1980 Records of District Extension Chairmen
1980 4-H Expansion Budget

DEFENDANTS' EXHIBIT 227

4-H VOLUNTEERS

Year	Black	Percent-age	White	Percent-age	Total
1972	2,665	31	5,988	69	8,653
1976	3,760	32	8,174	68	11,934
1980	4,022	27	11,122	73	15,144

4-H MEMBERSHIP

Year	Black	Percent	White	Percent	Total*
1972	22,174	32	46,313	68	68,486
1976	32,210	35	60,146	65	92,356
1980	30,243	32	64,138	68	94,381

* American Indian excluded from data

DEFENDANTS' EXHIBIT 228

Year	Number of Single Racial Clubs in Mixed Communities	Number of Youth Involved in these Clubs	Total State 4-H Membership
1974	1,014	19,789	95,589
1976	953	21,286	93,408
1978	920	17,625	97,045
1980	880	14,988	95,453

DEFENDANTS' EXHIBIT 255

SALARY DATA FOR 35 PEOPLE WHO WERE ACTIVELY EMPLOYED DURING 1975 BUT WERE NOT ON DR. MANN'S LIST OF PEOPLE USED IN HIS 1975 REGRESSION

	Salary Data			
	1973	1974	1975	1976
Marilyn Cole		9,641	9,711	10,741
William S. Dixon			9,100	10,276
Simpson Currin			14,080	14,890
James Dunford		12,204	12,397	
Pamela Gillenwater		9,472	9,472	
John Rutledge			9,604	
Ernest C. Short	10,257	10,887	10,957	11,535
John Stacy	16,441	17,809	18,255	18,855
George Stoudemire	17,015	19,014	20,350	
Mary M. Swanner	8,500	9,242	9,292	
Colon Godwin		13,815	15,415	
Archie Martin	15,000	16,464	19,379	
Marie Penuel			12,342	
James Sikes	8,500	9,350	9,615	
Harvey Thornton	9,406	10,156	10,369	
Barbara Hinnant			9,160	10,593
Marjorie Holloway	8,728	9,493	9,553	10,053
Ona Humphrey	15,281	16,413	16,513	
Slater T. Lloyd	11,947	12,970	12,970	
Dennis Osborne			11,100	12,000
Cullie Tarlton	17,007	18,505	19,014	
Linda Vandemark			10,450	
Marilyn Blanchard			9,259	9,559
Louise Capps	10,143	10,978	11,187	
Richard M. Edwards	12,149	13,236	13,316	14,116
James Piland			9,170	
Steve Riddick	8,692	9,856	12,500	13,428
Naomi Desantels			19,622	
Mary Gaddy	8,500	9,261	9,429	
Mary Jones	8,674	9,868	9,928	
William Meyer	10,000	10,800	12,650	
Clifton Parker	9,914	10,654	10,650	
Ray Williamson			9,498	
Marcia Winnies		9,100	9,160	9,510
Dori Boyd		9,100	9,150	

DEFENDANTS' EXHIBIT 258

Non-Extension Homemakers Audiences

Year	Man Days	% of H. E. Time
1978	3,881	77%
1979	37,474	82%
1980	36,911	82.5%

Supreme Court of the United States

No. 85-93

P. E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ORDER ALLOWING CERTIORARI. Filed November 12, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

Supreme Court of the United States

No. 85-428

UNITED STATES, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ORDER ALLOWING CERTIORARI. Filed November 12, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

PETITIONER'S

BRIEF

FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-93 and 85-428

In the Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

1. Whether black state employees establish a claim under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), by identifying current salary disparities between themselves and white employees holding the same jobs and demonstrating that such disparities result from a pre-1965 state policy of paying blacks lower salaries than whites.

2. Whether the court below was incorrect in concluding that the statistical evidence of salary disparities in this case failed to meet the petitioners' burden of accounting for variables which ought to be reasonably viewed as determinants of salary.

3. Whether respondents are liable under Title VII, on the basis of their joint responsibility for final selections of employees to fill county chairman positions, for discrimination in those selections.

4. Whether, in providing financial assistance to voluntary single-race clubs, respondents comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and the Fourteenth Amendment by requiring that membership in those clubs be open to all without regard to race.

5. Whether a plaintiff class should have been certified in this case.*

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* This question does not affect the government's interests; it is accordingly not addressed in this brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-93

P. E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

No. 85-428

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 346a-481a)[1] is reported at 751 F.2d 662. The opinions of the

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[1] "Pet. App." refers to the separately bound appendix filed with the petition in No. 85-93. In quoting materials from this appendix, we have corrected typographical errors in the filing; those corrections are indicated by brackets. "Supp. Pet. App." refers to the supplementary appendix bound with the petition in No. 85-428. "J.A." refers to the separately bound appendix filed with this brief. "C.A. App." refers to the 10-volume court of appeals appendix, 10 copies of which have been lodged with this Court. "C.A. Br." refers to the Brief for the United States filed in the court of appeals, 10 copies of which have also been lodged with this Court.

district court (Pet. App. 3a-207a, 216a-345a) are unreported.

JURISDICTION

The judgment of the court of appeals (Supp. Pet. App. 1a-3a) was entered on December 10, 1984. Rehearing was denied on April 15, 1985 (Pet. App. 482a-483a). On July 5, 1985, the Chief Justice extended the Government's time for filing a petition for a writ of certiorari to and including September 12, 1985. The petition in No. 85-93 was filed on July 15, 1985, and the petition in No. 85-428 was filed on September 12, 1985. Both petitions were granted on November 12, 1985 (J.A. 181-182). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), are reproduced at pages 3-4 of the petition in No. 85-93.

STATEMENT

1. The North Carolina Agricultural Extension Service (the Service) provides services to state residents involving the dissemination of "useful and practical information on subjects relating to agriculture and home economics," *e.g.*, through educational programs for farmers and sponsoring 4-H and extension homemaker clubs (Pet. App. 7a, 12a-20a). It is funded jointly by the United States Department of Agriculture, the State of North Carolina, and the various counties in the State (Pet. App. 7a-8a). The Service employs agricultural extension agents, professional employees at the county level, of which there are three ranks: full agent, associate agent, and assistant agent (Pet. App. 17a). The three ranks perform "essentially the same types of tasks," but the full agents have more responsibility and are expected to maintain higher performance levels than associate

agents, the intermediate position, or assistant agents, the entry level position (*ibid.*).[2]

Until August 1965, the Service was divided into "a white branch * * * and a Negro branch * * * composed entirely of black personnel and serv[ing] only black farmers, homemakers and youth" (Pet. App. 27a). Although black and white county agents had identical responsibilities and job descriptions (Pet. App. 29a), "[t]he salaries of black agents in the segregated system were lower than the salaries of their white counterparts" (Pet. App. 30a). The two branches of the Service were merged on August 1, 1965 (Pet. App. 30a, 359a), and a single minimum entry level salary was adopted for all agents hired after the merger.[3]

Shortly before the merger, the position of county extension chairman was created by making the white county agents responsible for coordinating the entire extension program in their respective counties (C.A. App. 1001-1002, 1783). In November 1972, the Service introduced a system of announcing job v[illegible]ncies and accepting applications for county chairman positions (Pet. App. 24a-25a, 75a).[4] Applicants who possess the minimum qualifications for county chairman are interviewed by Service officials, who then make a recommendation to the board of county commissioners (Pet. App. 25a-26a, 76a-

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[2] In this brief we will use the term "agents" to refer collectively to employees in all three ranks.

[3] Newly hired agents with advanced degrees, prior relevant experience, or particularly needed skills are paid more than the minimum. Each agent's salary also reflects a contribution by the county in which he is employed, the amount varying from county to county. Pay increases awarded by the county or the state may be in the form of an equal sum to each employee or as a percentage of the salary. Finally, the state and some counties provide for merit pay increases and increases to offset inflation (Pet. App. 109a-115a, 360a-362a).

[4] Before that time, county chairmen were selected jointly by the Service and the board of county commissioners concerned from a list of possible candidates prepared by the Service (C.A. App. 165, 485-488; Pet. App. 101a).

77a). The county generally accepts the recommendation (C.A. App. 171), but "all appointments are worked out jointly between the Extension Service and the commissioners and no official action can be taken unilaterally by either party with respect to filling a vacancy" (Pet. App. 77a).

Prior to 1965, the Service had established separate all-white and all-black 4-H and extension homemaker clubs, and many clubs presently have only members of a single race (J.A. 103; C.A. App. 1807), although the number of integrated Clubs increased nearly three-fold between 1972 and 1980 (C.A. App. 1807, 180, 1140). After 1965, the Service requested a formal assurance from each club that it would not discriminate on the basis of race, color, or national origin (GX 115, at 3). The Service has also published in the media its policy that all voluntary clubs be organized without regard to race, instructed its agents to encourage formation of new clubs on that basis (Pet. App. 181a), and integrated all other aspects of the 4-H program.

2. a. This suit was initiated in November 1971 by more than 50 black employees of the Service, alleging, inter alia, intentional racial discrimination in employment and services in violation of the Fourteenth Amendment to the Constitution, 42 U.S.C. 1981, and Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (Pet. App. 3a-4a). After Title VII of the Civil Rights Act of 1964 became applicable to the states in 1972, the complaint was amended to include claims under Section 703 of that Act, 42 U.S.C. 2000e-2, and the United States intervened in the action. The complaint in intervention, as amended, also alleged racial discrimination against black employees and recipients of services in violation of the Fourteenth Amendment, Title VI, and Title VII (Pet. App. 5a, 35a).

Plaintiffs asserted intentional racial discrimination in various incidents of employment, including salaries, job assignments and promotions, and in the selection of county chairmen, as well as in the continued support of

single-race 4-H and extension homemaker clubs (Pet. App. 49a-51a). The employment-related claims included individual claims of discriminatory treatment as well as allegations of intentional patterns and practices of discrimination (Pet. App. 49a-51a, 227a-339a).

b. The case was tried to the court for 10 weeks starting in December 1981 (Pet. App. 4a). During discovery, the defendants had asserted that four factors were determinative of salary: education, tenure, job title and job performance (GX 159, at 90, 96 (Oct. 16, 1981, Deposition of Dr. Paul Dew, Assistant Director of County Operations)). At trial, the evidence introduced by the United States included multiple regression analyses comparing the salaries of black and white county agents in 1974, 1975 and 1981. Certain of these regressions used four independent variables—race, education, tenure, and job title—and showed a statistically significant racial effect for 1974 (C.A. App. 1601, 402-403) and 1975 (C.A. App. 1589, 416), and a smaller racial effect, without statistical significance, for 1981 (C.A. App. 1578).[5]

The district court indicated that, based on this evidence, plaintiffs would prevail unless defendants produced statistical evidence demonstrating that the addition of other variables would reduce or eliminate the racial effect.[6] Accordingly, defendants also introduced multiple regression analyses, for 1975 and 1981. Certain of these regressions used the same variables as plaintiffs' regressions, but excluded county chairmen from the data base, and these analyses produced results similar to plain-

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[5] These results were corroborated by other evidence, including an exhibit, based on January 1973 payroll data for 23 counties, that showed 29 black employees earning less than whites in the same county with comparable or lower positions and the same or less tenure and education (C.A. App. 1563-1567).

[6] The court told respondents' counsel (C.A. App. 525):

> [I]f under the law all those things should have been cranked in there, and if after cranking them in you get a different result, then you win. If they ain't got any business in there or if you've cranked them in and it still doesn't show it, then they win.

tiffs' (C.A. App. 1716 (analyses), 1711-1712, 1691-1692). In addition, defendants presented regressions that added quartile rank, a measure of job performance, as an independent variable.[7] Doing so for 1981 produced statistically insignificant racial disparities, but doing so for 1975 *increased* the racial effect, and this result was statistically significant (C.A. App. 1716 (analysis 6), 1713-1714)).

Plaintiffs also introduced evidence showing that although the size of the 4-H club system has varied considerably over the years, there have been more than 1,000 all-white clubs each year since 1972 (C.A. App. 2237; GX 11), and more than 850 single-race clubs in communities identified by defendants as "ethnically mixed" (C.A. App. 1807). The extension homemaker clubs also remain largely single-race clubs (J.A. 103-113; C.A. App. 1806-1807; Tr. 941-942, 1524-1525, 2390, 2449-2450).[8]

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[7] Quartile rank is used in determining merit salary increases (see note 32, *infra*). The government did not use this variable in its regression analyses because the quartile system was itself under attack in this suit as racially discriminatory (see Pet. App. 391a-400a).

[8] The government also introduced statistical and other evidence relating to the selection of county chairmen. The first black chairman was not selected until March 1971, after 151 white chairmen had been selected (J.A. 127; GX 75). Between November 1972, when the first vacancy announcement appeared (see note 4, *supra*) and October 1981, 72 (93.5%) of the 77 county chairmen selected were white and 5 (6.5%) were black (J.A. 114-124; C.A. App. 919-920). No black was selected for any of the 31 positions filled between November 1972 and July 1, 1976, although 12 (10.3%) of the 116 applicants for those positions were black. Several blacks testified that they had not sought chairmanships because they believed it would be futile to do so (Pet. App. 93a). Of the 5 blacks among the candidates selected for the 46 positions filled between July 1976 and October 1981, 3 were selected for vacancies for which only blacks were in competition, and the sole white applicant with which the other 2 competed was a female; no black has ever been selected in competition with a white male applicant (J.A. 114-124; C.A. App. 1003, 1006; GX 172, at 94-95; see C.A. Br. Table 7, at 10a-11a).

c. The district court rejected all claims of the private plaintiffs and the United States. With respect to the salaries of county-level employees, the court held that no pattern or practice of racially discriminatory treatment had been shown (Pet. App. 150a). The court noted that "[i]t is undisputed" that before the merger of its black and white branches in 1965, the Service paid black agents less than white ones, and recognized that, although "steps were taken to begin [the] elimination" of this disparity before the Service was covered by Title VII in 1972, "the government has offered evidence tending to show that as of January 1973, the salaries of numerous black agents throughout the system were less than those of white agents in the same counties who were in comparable or lower positions and who had comparable or less tenure • • • [and] defendants' own exhibit [showed] some salary disparities between blacks and whites as late as October, 1974" (Pet. App. 120a-121a). The district court nevertheless found that "while on its face [the] evidence unquestionably establishes salary disparities, when viewed in the light of defendants' explanatory evidence it fails to prove discrimination" (Pet. App. 122a-123a).[9] Focusing on certain regressions that controlled only for tenure and education (Pet. App. 131a), rather than on those also including job title and job performance as independent variables, the court described the regression analyses as

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[9] Before analyzing the statistical data, the court explained its approach to the requirements of the Civil Rights Act of 1964 (Pet. App. 121a-122a):

> Just as it had been found in the area of education that there is no such thing as instant integration, it was soon found in the field of business and industry that there is no such thing as instant [e]quality in employment. Without risking serious disruption of a business by prohi[b]itively costly budgetary alterations and a possible practice of wholesale reverse discrimination it was soon recognized (though not always by the courts) that the adjustments mandated by the law simply could not be made overnight.

Thus, the "explanatory evidence" the court viewed as justifying the salary disparities established by the government apparently included the historical fact of discrimination.

flawed, primarily because the raw data on which they were based included the salaries of higher-paid county chairmen, most of whom were white, as well as county agents (Pet. App. 136a-138a), and because they failed to account for "several unmeasured factors, notably job performance" (Pet. App. 141a).[10] In sum, the court "conclude[d] that the plaintiffs had probably made out a prima facie case with respect to defendants' promotion and salary practices * * * [but] the defendant * * * articulat[ed] plausible reasons for its actions * * * which the court found convincing" (Pet. App. 190a).

As to the claim that the Service permitted segregated 4-H clubs and extension homemaker clubs to be maintained in North Carolina, recognizing and providing services to such clubs, the district court found that "there are many clubs to which members of both races belong" (Pet. App. 165a), and that "[i]f any individual has become a member of a club composed only of members of his or her own race, it has been an entirely voluntary act" (Pet. App. 172a). The court found no evidence of any denial of membership or discrimination in services on the basis of

[10] The court relied on a list of variables provided by defendants (Pet. App. 133a-134a):

(1) Performance of agents measured against the agents' plan of work;

(2) The variation in salaries created by across the board state raises with the different percentage of state contributions in each county;

(3) The across the board increases in agent salaries by some counties and not in others;

(4) The merit raises provided by the state;

(5) The merit raises provided for by the counties in which Extension Service personnel have no input;

(6) The merit raises provided by the counties with limited or full participation in the merit recommendation by Extension Service personnel;

(7) The range in merit salary increases provided by the counties (0 [to] 12% in 1981);

(8) Prior and relevant experience; and

(9) Variations in salary due to market demands both at time of hire and later for agents with skills in short supply or prior experience.

race, and concluded that the law does not require that these clubs be integrated (Pet. App. 165a-185a). The court ruled that the evidence did not demonstrate any discriminatory intent on the Service's part in tolerating the single-race clubs (Pet. App. 179a-182a), and that the Service accordingly did not violate the law in continuing to provide services to such clubs (Pet. App. 184a-185a).[11]

3. a. The court of appeals affirmed (Pet. App. 346a-425a), Judge Phillips dissenting in part (Pet. App. 425a-481a). The panel majority adopted the district court's findings that under policies in effect when the Service maintained two separate racially segregated branches, black employees were paid less than white employees performing the same job because of their race, and that even after the Service became subject to Title VII in 1972, "[s]ome pre-existing salary disparities continued to linger on" (Pet. App. 360a). However, the court stated succinctly (Pet. App. 380a):

> The plaintiffs claim that the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not. We do not think this is the law.

[11] The district court also held that the plaintiffs failed to establish a prima facie case of racial discrimination in the selection of county chairmen, and that "in any event the defendants have effectively rebutted plaintiffs' case by showing the inaccuracy and insignificance of plaintiffs' proof" (Pet. App. 100a). The court found that only 77 county chairman positions had been filled since the institution of statewide vacancy announcements in 1972, the year Title VII was made applicable to public employers, and that blacks had applied for only 18 of those positions (Pet. App. 78a, 85a-86a). Considering those 18 positions (and thus including positions for which only blacks applied but excluding positions for which only whites applied) the court found the selection rate for blacks acceptable (Pet. App. 79a-80a, 86a), and held that the Service's selection procedures for county chairman have, since 1972, been applied in a nondiscriminatory manner (Pet. App. 100a-101a). The court rejected plaintiffs' claim that blacks had been deterred from applying for chairmanships (Pet. App. 99a), and also rejected all individual claims of discrimination in promotions to county chairman (Pet. App. 227a-317a).

The panel majority relied for its view on *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), as well as several court of appeals decisions that followed *Evans* in rejecting time-barred claims despite the continuing effects of the alleged discriminatory acts on seniority rights (Pet. App. 380a-382a). This view of Title VII's requirement led the panel to fault all of the regression analyses of the salaries of current county employees —recent hires as well as pre-Act hires—because the figures analyzed "reflect the effect of pre-Act discrimination" (Pet. App. 389a). For this reason, as well as because "both experts omitted from their respective analys[e]s variables which ought to be reasonably viewed as determinants of salary," the analyses were deemed "unacceptable as evidence of discrimination" (Pet. App. 391a).

With respect to the selection of county chairmen, plaintiffs challenged on appeal the district court's analysis of selection rates, arguing that the court erred in excluding vacancies for which only whites applied, while including vacancies for which only blacks applied (Pet. App. 411a-412a). The court of appeals majority found it unnecessary to consider these objections, because it concluded that "the employment decisions made by the Extension Service with respect to the selection of County Chairmen were made when the Service either recommended or did not recommend an applicant for an existing vacancy to the County Commissioners" (Pet. App. 405a-406a). It therefore examined the data as to the Service's recommendations, rather than the selection statistics relied on by plaintiffs and the district court, and found no discrimination (Pet. App. 418a-423a).[12]

[12] The court's initial analysis (Pet. App. 413a-414a), includes all positions for which black candidates applied, whether or not white candidates also competed, but excludes positions for which only white candidates applied. The court's more extended analysis (*id.* at 418a-421a) includes "applicant flow data" for all positions filled during the years 1968-1981. In the latter analysis, the court's references to "applicants" or "applications" during the period 1968-1971, when there were no vacancy announcement and application procedures, evidently refers to the list of possible candidates prepared by Service officials, from which they later made recommendations to the counties (see note 4, *supra*); the court's references to white or black "approvals" refers to the recommendations made by the Service to the counties (see chart preceding Pet. App. 420a).

Finally, the panel majority held that the district court "correctly denied the plaintiffs' claim with respect to the alleged affirmative duty to require integrated membership" in 4-H clubs and extension homemaker clubs because, absent any proof of discrimination, "the mere existence of all white and all black * * * [c]lubs in some racially mixed communities" does not violate the law (Pet. App. 424a n.128).

b. Judge Phillips dissented from the majority's dismissal of the salary claims (Pet. App. 425a, 433a-469a),[13] noting that it was undisputed that prior to the 1965 merger "the salaries of black professionals were intentionally and quite openly simply set lower than those of white colleagues in the same employment positions" (Pet. App. 437a), and that these salary differentials continued "well past 1968 (the earliest limitation date applicable to the salary claim)" (Pet. App. 438a-439a).[14] The regression analyses of both plaintiffs' and defendants' experts were, moreover, in his view, "wholly consistent" in showing a substantial, across-the-board race-based disparity (Pet. App. 449a-450a). Because these analyses "employ[ed] the most obvious alternative variables of tenure, education, and job position" (Pet. App. 449a), Judge Phillips found no authority for rejecting such analyses "for failure to include a number of other independent variables merely hypothesized by defendants" (Pet. App. 448a).

[13] He also dissented from the majority's rejection of the 4-H and extension homemaker club claims (Pet. App. 425a, 469a-481a).

[14] As Judge Phillips recognized the complaint, filed in November 1971, included claims based on the Constitution and Title VI; the latter has been applicable to the states since 1964. A three-year limitation period applies to those claims. *Cox* v. *Stanton*, 529 F.2d 47, 49-50 (4th Cir. 1975).

In sum, Judge Phillips concluded that "the only rational assessment to be made of the evidence in this record" is that "the general pattern of pre-1965 overt discrimination in salary continued in substantial, if gradually diminishing, degree until at least 1976 and perhaps beyond," and that responsible Service officials knew that such a race-based pattern continued and failed to correct it (Pet. App. 455a-456a). In his view, the majority's failure to award relief on such a record resulted from "misapprehensions of controlling legal principle" (Pet. App. 456a), including the "relevant time frame within which the existence of a pattern or practice of salary discrimination was to be assessed" (Pet. App. 457a).[15]

4. Rehearing en banc was denied by an equally divided court, without opinion, on April 15, 1985, and the panel, Judge Phillips again dissenting, also declined to rehear the case (Pet. App. 482a-483a).

SUMMARY OF ARGUMENT

Hiring and promotion decisions are discrete acts, which, if taken before the effective date of Title VII or outside of the applicable statute of limitations, cannot be the subject of a successful Title VII suit, even if the consequences of those actions continue to affect the employee until the time of suit. But Title VII does require the correction of unequal salaries that are the continuation of racially-based pay differentials originating pre-Act or in the time-barred period. This continuing salary discrimination is akin to intentionally discriminatory seniority systems, which, regardless of the date of their inception, afford no justification for race-based disparate treatment.

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[15] Judge Phillips disagreed with the panel majority's reading of *Evans* and *Hazelwood* as applicable to plaintiffs' salary claims (Pet. App. 462a-467a). Those cases, he explained, do not permit an employer to "continue practices now violative [of Title VII] simply because at one time they were not" (Pet. App. 465a). In his view, the *Evans-Hazelwood* principle "simply has no logical applica'ion" in cases involving "pay and other 'condition of employment' claims, as opposed to hiring and other work-force composition claims" (Pet. App. 466a).

With regard to the statistical evidence, the court of appeals articulated the correct rule—that in a disparate treatment case challenging salary differences, plaintiff's statistical analysis must include "variables which ought to be reasonably viewed as determinants of salary" (Pet. App. 391a)—but improperly applied that rule. The parties' multiple regression analyses, together with the other evidence introduced, proved that there was racial discrimination in salaries. None of the variables omitted from petitioners' analyses undermines that conclusion. As a corollary to the "reasonableness" standard for statistical proof, we urge that district courts be encouraged to make formal determinations at the earliest possible stage of the proceedings of the factors to be included in statistical analyses offered at trial.

Although private petitioners ask this Court to consider whether Title VII permits an employer to delegate its hiring decisions to a third party that invariably acts in a discriminatory manner (85-93 Pet. 49-55), this case presents no such issue. It is clear that the Service was jointly responsible with the county commissioners for the selection of county chairmen; even the court of appeals recognized this (Pet. App. 403a). The court's reliance on statistics relating to the recommendations made by respondents, rather than the final selection statistics, was accordingly inappropriate.

Finally, the court of appeals correctly found that respondents had satisfied their affirmative duty to desegregate the 4-H and homemaker extension clubs by maintaining and publicizing a policy of entirely open admissions to such clubs. Although some single-race clubs remain, neither the Constitution nor Title VI requires any particular degree of racial balance, and maintenance of the traditional option of individuals to join any club that they choose does not suggest that respondents are perpetuating their prior segregative practices.

ARGUMENT

I. BLACK STATE EMPLOYEES ESTABLISH A CLAIM UNDER TITLE VII BY IDENTIFYING CURRENT SALARY DISPARITIES BETWEEN THEMSELVES AND WHITE EMPLOYEES HOLDING THE SAME JOBS AND DEMONSTRATING THAT SUCH DISPARITIES RESULT FROM A STATE POLICY BEFORE 1965 OF PAYING BLACKS LOWER SALARIES THAN WHITES.

The court of appeals acknowledged that, before the merger in 1965, the Service maintained two separate racially-segregated branches and paid black employees less than white employees because of their race; that, after the merger, these race-based disparities were not immediately eliminated; and that these disparities continued after this suit was filed and after Title VII became applicable to the Service in March 1972 (Pet. App. 359a-360a, 389a-390a). As a result, since the effective date of the Act, black employees hired before 1965, because of their race, have received and continue to receive lower salaries than white employees who have been performing the same job for the same length of time. The court of appeals incorrectly decided that Title VII provides no remedy to these black employees (Pet. App. 380a-382a, 399a-400a).

The court of appeals relied in large part on this Court's decisions in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), interpreting those decisions as absolving an employer of any responsibility for affirmatively eliminating the continuing effects of pre-Act salary discrimination provided it has adopted a race-neutral policy in establishing salaries for post-Act hires. The appellate court's reliance is misplaced, however, as this Court's decisions in *Evans* and *Hazelwood* are readily distinguishable from the case at bar.

In *Evans*, a female flight attendant forced to resign when she married in 1968, and rehired in 1972 after the "no marriage" policy for female flight attendants was

discontinued, challenged United's refusal to credit her prior service towards her seniority. Noting the absence of any allegation that prior service is credited to rehired male employees under United's seniority system, this Court acknowledged that the denial of pre-1972 seniority "does indeed have a continuing impact on [Evans'] pay and fringe benefits" (431 U.S. at 558), but rejected her claim that United was guilty of a continuing violation of Title VII, stating (*id.* at 558, 560):

> [T]he seniority system gives present effect to a past act of discrimination [the forced resignation]. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the [statutory limitations period]. A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.
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> The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory. But such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.

The Court's decision in *Evans* thus turned on the fact that United's past act of discrimination—forcing Evans to resign because she was a married female—was a single, discrete act taken at a time outside of the applicable statutory limitations period, and as such was not actionable under Title VII. The Court acknowledged, as the court of appeals assumed here, that the *Evans* rule is equally applicable when the discriminatory act was taken before the effective date of Title VII.

To similar effect is the Court's decision in *Hazelwood*. There this Court vacated a court of appeals judgment, based on statistical disparities between the racial composition of Hazelwood's teaching staff and that of the qualified public school teacher population in the relevant labor market, that the school district had engaged in a pattern and practice of hiring discrimination in violation of Title VII. Although this Court agreed that the court of appeals correctly rejected the district court's statistical analysis, it held that the statistical disparities on which the appellate court relied were not dispositive (433 U.S. at 309-310 (footnote omitted)):

> The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes. For this reason, the Court cautioned in the *Teamsters* opinion [*International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977)] that once a prima facie case has been established by statistical workforce disparities, the employer must be given an opportunity to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination." 431 U.S., at 360.

Thus, *Hazelwood* indicates that Title VII is not violated by disparities in the racial composition of an employer's staff which are the present effects of discriminatory hiring decisions, all of which occurred before the effective date of Title VII.

Evans and *Hazelwood* thus establish that pre-Act or time-barred hiring and termination decisions cannot form the basis of a claim under Title VII, even when those decisions have continuing current effects due, for example,

to the operation of a bona fide seniority system.[16] Similarly, pre-Act or time-barred promotion decisions cannot be challenged under Title VII on the theory that the claimant who should have received the promotion now continues in a lesser job at a salary level below that which he would have obtained had he not been the victim of the pre-Act or time-barred discrimination.[17] Hiring and promotion decisions are discrete acts, taken once and for all at a single moment in time. *Evans* and *Hazelwood* teach that if that moment occurred prior to the effective

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[16] Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), validates only "bona fide" seniority systems. If an employee can show that the seniority system was adopted with a discriminatory intent, Section 703(h) affords the employer no protection. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 276-277 (1982). This Court has emphasized that Section 703(h) "makes no distinction between seniority systems adopted before its effective date and those adopted after its effective date." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 76 (1982).

[17] There appears to be a conflict among the circuits as to whether an employee can avoid a statute of limitations defense by establishing he was denied promotion pursuant to a continuing practice of discriminatory promotion denials, or whether he must file within the statutory period after he is himself denied promotion even where such a practice is alleged. Compare, *e.g.*, *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978) (continuously maintained promotion policy may be subject of complaint until statutory time "after the *last occurrence* of an instance of that policy," citing cases), and *Patterson* v. *American Tobacco Co.*, 586 F.2d 300, 304 (4th Cir. 1978) (*Evans* is inapplicable where a discriminatory promotion system is maintained; the discrimination continues from day to day and a specific violation occurs whenever a promotion is made), with, *e.g.*, *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 977-978 (5th Cir. 1980) (suit must be filed within statutory time after employee should have perceived discrimination was occurring). However, we are unaware of any case in which a court has permitted an employee to rely on the current effect of a discriminatory promotion policy that was terminated in a time-barred period. Such a complaint, we submit, would clearly be untenable under *Evans*. Moreover, we have serious doubts about the validity of any theory that would permit an employee who does not sue in a representative capacity to recover when the denial of promotion that affected him is wholly pre-Act or time-barred, even if the discriminatory policy continues so as to affect other employees.

date of the Act or beyond the reach of the statute of limitations, the discriminatory decision cannot be the subject of a Title VII suit, even though the consequences of that decision may well continue to the present. Indeed, it could scarcely be otherwise unless the Act is, as a practical matter, to have retroactive application, and relief for past illegalities is to be available into the indefinite future. For better or worse, unlawful discriminatory hiring, promotion and termination decisions must either be timely complained of or be taken to have fixed a person's situation once and for all—unless, of course, fresh illegalities are subsequently committed.

No such practical and conceptual difficulties attend the correction of unequal salaries that are the continuation of pre-Act, admittedly racially-based pay differentials. One claim in the case at bar is that the Service has continued to pay certain black employees less than white employees holding the same job for the same length of time, simply because of their race. Until now, the courts of appeals—including the Fourth Circuit—have consistently held that such discrimination in compensation is a continuing violation of Title VII, and as such is actionable, notwithstanding *Evans* and *Hazelwood*, even when the pay differentials originated before the effective date of the Act or outside of the statutory limitations period. Thus, for example, the Fourth Circuit stated in *Jenkins* v. *Home Insurance Co.*, 635 F.2d 310, 312 (1980) (per curiam):

> Unlike *Evans*, the Company's alleged discriminatory violation occurred in a series of separate but related acts throughout the course of Jenkins' employment. Every two weeks, Jenkins was paid for the prior working period • • • an amount less than was paid her male counterparts for the same work covering the same period. Thus, the Company's alleged discrimination was manifested in a continuing violation which ceased only at the end of Jenkins' employment.

Accord, *Kim* v. *Coppin State College*, 662 F.2d 1055, 1061 (4th Cir. 1981) ("This court • • • has consistently distinguished *Evans* when the discriminatory employment practice has continuously affected the complaining employee and is continuing."); *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir. 1982) ("[T]he discrimination was continuing in nature. Hall suffered a denial of equal pay with each check she received."); *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 743 (8th Cir. 1980) ("The practice of paying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues."); *Bartelt* v. *Berlitz School of Languages of America, Inc.*, 698 F.2d 1003, 1004 (9th Cir.), cert. denied, 464 U.S. 915 (1983) ("The policy of paying lower wages to female employees on each payday constitutes a 'continuing violation.'"). Cf. *Perez* v. *Laredo Junior College*, 706 F.2d 731 (5th Cir. 1983) (applying Title VII principles in suit under Sections 1981 and 1983).

Viewing discrimination in compensation as a continuing violation of Title VII, the courts of appeals after *Evans* have held that pre-Act, intentional discrimination cannot be used to justify the post-Act payment of lower salaries to minority employees than to other similarly situated employees. In *Lamphere* v. *Brown University*, 685 F.2d 743, 747 (1st Cir. 1982), for example, the First Circuit ruled that a female faculty member's "allegations that she received a discriminatorily low wage after 1972 [when Title VII became applicable to educational institutions] as a result of pre-1972 discrimination" were actionable, stating: "[A] decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights." Cf. *Berry* v. *Board of Supervisors of Louisiana State University*, 715 F.2d 971, 980 (5th Cir. 1983).

These court of appeals decisions reflect the proper construction of Title VII, and correctly distinguish challenges to salary discrimination originating before the Act or outside of the limitations period, but continuing after the effective date of the Act, from cases such as *Evans* and *Hazelwood* involving challenges to the post-Act effects of

discrete pre-Act decisions such as hiring and termination. The continuing salary discrimination involved here is akin to the continued use of an intentionally discriminatory seniority system, which this Court has held is unlawful under Title VII even if the seniority system was adopted before the Act became effective. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 276-277 (1982); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 76 (1982).[18] Just as an intentionally discriminatory pre-Act seniority system affords no justification for current employment practices that have a race-based effect, so too an intentionally discriminatory pre-Act salary system affords no justification for current salary practices that have a race-based effect. To the extent that the court of appeals' justification of post-Act salary disparities as merely the "lingering effect" of pre-Act overt discrimination (Pet. App. 399a) represents a willingness to tolerate such practices, its decision cannot be allowed to stand.[19]

[18] See note 16, *supra*. This Court addressed the question of continuing pre-Act salary disparities in the context of a suit under the Equal Pay Act, 29 U.S.C. 206; *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974). That decision is not strictly in point here, however, as a violation of the Equal Pay Act is established simply by showing the payment of lower wages to women than to men performing the same work; the date when the disparity originated, and the reasons underlying the disparity, are largely irrelevant. In contrast, the plaintiff in a discriminatory treatment case under Title VII must establish not only the disparity in wages, but also the employer's intent to discriminate. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 335 n.15. Thus, a current disparity in salaries, without more, cannot be the basis for this Title VII claim of discriminatory treatment. Instead, it is necessary to examine the basis for that disparity to determine whether there has been actionable intentional discrimination subject to a timely challenge. Here, although the Service's decision to pay black employees less than whites for the same work was taken before Title VII became applicable to public employers, there is no dispute that the Service's compensation scheme remained intentionally discriminatory. See pages 7, 9, *supra*; Pet App. 439a-440a; J.A. 129-130.

[19] Further fact finding will be necessary to establish the recovery due any individual employee. As both courts below emphasized, the

II. THE REGRESSION ANALYSES SHOWED RACIAL DISCRIMINATION, AND RESPONDENTS DID NOT REFUTE THAT SHOWING

The court of appeals clearly would have erred if it had held, as private petitioners assert in their Questions Presented, "that statistics may not be treated as probative evidence of discrimination unless the statistical analysis considers every conceivable non-racial variable" (85-93 Pet. i). However, the court below did not impose this onerous "every conceivable variable" burden on petitioners in this case. Rather the appellate court articulated the correct rule, that a plaintiff's statistical analyses in a disparate treatment case must include "variables which ought to be reasonably viewed as determinants of salary" (Pet. App. 391a). We nevertheless agree with private petitioners that the result reached by the court below cannot be sustained because of a variety of errors of fact and law.

It should be noted at the outset that reversal of the court below on the first Question Presented automatically requires reversal of the court of appeals' analysis of the statistical proof. One of the bases for the court's rejection of petitioners' regression analysis in this case was that "the analysis contained salary figures which reflect the effect of pre-Act discrimination" (Pet. App. 389a). Because the result we urge on the first Question Presented affirms the correctness of considering the effects of the pre-Act salary discrimination in this case, the holding of the court below cannot stand. At a minimum, the case should be remanded for consideration of whether, when the effect of the pre-Act discrimination on salary

effects of the original discriminatory salary practices are part of a complex matrix of pre- and post-Act salary decisions, including merit raises, cost of living increases, and county-to-county variations in salary increases (Pet. App. 109a-116a, 360a-362a). The extent to which these decisions carry forward the effects of the original discriminatory practices, and the extent to which any such decision is actionable in this suit by any employee, must be resolved first by the district court.

is considered, the petitioners' statistics demonstrate disparate treatment in fixing salaries.

But other factual and legal errors in the court of appeals' analysis of the statistical proof in this case require entry of judgment for the petitioners on the issue of salary discrimination. Before discussing these errors, however, we outline the general standards for analyzing the legal sufficiency of a plaintiff's regression analysis in a disparate treatment pay disparity case.[20]

A. In Order To Establish A Prima Facie Case Of Salary Discrimination, A Regression Analysis Must Control For Factors That Normally Affect Salary

Because this is a disparate treatment case, "[p]roof of discriminatory motive is critical" to a claim of class-wide discrimination in fixing salaries. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 335-336 n.15. But a plaintiff is not required to prove discriminatory motive directly. A plaintiff establishes a prima facie case of intentional racial discrimination under Title VII if he "eliminates the most common nondiscriminatory reasons" for the challenged act. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). The reasoning underlying this standard was explained in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (emphasis in original):

> [W]e are willing to presume [intentional discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an application have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

[20] Our discussion focuses on the use of one type of statistical evidence: multiple regression analyses. A party may offer other types of statistics, such as cohort studies and multiple pool tests, either instead of or in addition to regression analyses. We do not suggest that regression analyses are the only, or even the best, statistical tools for use in disparate treatment cases.

When plaintiffs present their proof in the form of statistical analyses, these basic principles should not change. Statistical methods should continue to reflect the premises that in a disparate treatment case plaintiff claims to be the victim of intentional discrimination, and that plaintiff bears the burden of proving that intention. Statistics are just a way of proving intention by indirect, inferential means. The touchstone of whether plaintiff has made out a prima facie case (that is, whether plaintiff has made a showing sufficient to permit the case to be presented to the trier of fact) is whether his statistical analysis eliminates the "most common nondiscriminatory reasons" for the disparate treatment, thus leaving racial discrimination as the logical inference. In order to apply these principles to statistical proof in a disparate treatment case, however, it is essential to understand the probative value of the statistics. "As this Court admonished in *Teamsters*: '[S]tatistics . . . come in infinite variety . . . . [T]heir usefulness depends on all of the surrounding facts and circumstances.' 431 U.S., at 340." *Hazelwood School District* v. *United States*, 433 U.S. at 312.

In this case the primary statistical proof offered by the United States on behalf of the plaintiffs consisted of multiple regression analyses. The purpose of a multiple regression analysis in this setting is to determine whether the factor of race has sufficient correlation to salary differentials to satisfy plaintiff's burden of proving intentional discrimination. In the language of statistics, salary is referred to as the "dependent variable" in the calculation. To make the calculation "one first specifies the major variables [referred to as 'independent variables'] that are believed to influence the dependent variable." Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705 (1980). "The relationship between the dependent variable [here, salary] and the

independent variable of interest [here, race] is then estimated by extracting the effects of the other major variables" (*id.* at 706). "The results of multiple regressions can be read as showing the effects of each variable on the dependent variable, holding the others constant. Moreover, those results allow one to make statements about the probability that the effect described has merely been observed as a result of chance fluctuation" (*ibid.*).

Thus in order to show that race is likely to have influenced salary, a multiple regression analysis must control for other major variables that are thought to influence salary. A multiple regression analysis that is so structured can meet the plaintiff's burden of proving a prima facie case of disparate treatment because the statistical proof eliminates the "most common nondiscriminatory reasons" for the disparate treatment.[21]

Conversely, if the plaintiff's multiple regression analysis does not account statistically for the "most common nondiscriminatory reasons" for differences in salary, the statistics cannot be said to give rise to an inference of racial discrimination and therefore do not make out a prima facie case. This principle was recognized in the context of hiring discrimination in *Hazelwood School District* v. *United States*, 433 U.S. at 308. The Court held in that case that in order to show racial discrimination in hiring school teachers the "proper [statistical] comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the *qualified* public school teacher population in the relevant labor market" (*ibid.*; emphasis added). The Court went on to explain that the statistical analysis must account

[21] In addition, of course, the multiple regression analysis must have statistical reliability. "[A] regression not only estimates the effects of the variables involved in the model but also measures the certainty or accuracy of such estimates. In addition, it provides overall measures of how well the model fits the data as a whole." Fisher, *supra*, 80 Colum. L. Rev. at 716. The statistical significance of the petitioners' regression analyses was not questioned by the courts below and is not an issue in this case.

for hiring qualifications in order to have probative value (*id.* at 308 n.13):

> In *Teamsters*, the comparison between the percentage of Negroes on the employer's work force and the percentage in the general areawide population was highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

It follows from the *Hazelwood* Court's analysis, and a number of cases have so held,[22] that in a disparate treatment case if a plaintiff's statistics fail to account for the "most common nondiscriminatory reasons" for the employer's behavior (*Burdine*, 450 U.S. at 254) (that is, if they do not account for "variables which ought to be reasonably viewed as determinants of salary" (Pet. App. 391a), the defendant may prevail merely by pointing out that plaintiff's proof is not sufficient to give rise to an inference of discrimination. In those circumstances it should not be necessary for the employer to offer his own statistics in rebuttal.[23]

[22] See, *e.g.*, *Valentino* v. *U.S. Postal Service*, 674 F.2d 56, 70-71 (D.C. Cir. 1982); *Eastland* v. *Tennessee Valley Authority*, 704 F.2d 613, 624-625 (11th Cir. 1983); *Wilkins* v. *University of Houston*, 654 F.2d 388, 401-405 (5th Cir. 1981); cf. *St. Marie* v. *Eastern R.R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981).

[23] Some cases have indicated that an employer cannot challenge a plaintiff's statistical evidence without making a showing that the factor the employer claims should have been included in the plaintiff's analysis would in fact have eliminated the racial effect. *Segar* v. *Smith*, 738 F.2d 1249, 1267-1270 (D.C. Cir. 1984), cert. denied, No. 84-1200 (May 20, 1985); *Trout* v. *Lehman*, 702 F.2d 1094, 1102 (D.C. Cir. 1983), rev'd on other grounds, 465 U.S. 1056 (1984); cf. *Griffin* v. *Carlin*, 755 F.2d 1516, 1526-1528 (11th Cir. 1985). These cases rely on *Teamsters*, 431 U.S. at 360-362, for the relevant pattern of proof in class disparate treatment cases. But the pattern of proof in *Teamsters* does not differ significantly from that stated

This is not to say that the plaintiff as part of his prima facie case must present a perfect statistical analysis which takes into account every conceivably relevant variable. *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 (1977). Indeed, statistical theory presumes that even after the multiple regression analysis accounts for all the major factors thought to influence the dependent variable, other factors remain unaccounted for, and these factors may have a significant influence on the dependent variable. Fisher, *supra*, 80 Colum. L. Rev. at 705-706. If the plaintiff's statistics include the major non-discriminatory factors thought to influence salary, and if they show a statistically significant effect for race as a dependent variable, the plaintiff has made the required prima facie showing of disparate treatment. If at that point the defendant asserts that some additional factor should have been accounted for in the regression, the defendant must show that inclusion of the factor would have explained the salary disparity (that is, that inclusion of the factor would have eliminated the statistically significant effect for race). Requiring the defendant to offer statistical (or other) proof at this stage is consistent with the requirements of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). To dispel the adverse inference from a prima facie showing the employer must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Ibid.* Accord *Furnco*, 438 U.S. at 578.

As stated above, we believe that the court of appeals in this case articulated the correct standard, requiring the plaintiff's statistics in a disparate treatment case to include "variables which ought to be reasonably viewed as determinants of salary" (Pet. App. 391a). This rule of reason, like all general evidentiary standards, particularly those relating to statistical proof, will necessarily vary in application from case to case. See *Hazelwood*, 433 U.S. at 312; *Teamsters*, 431 U.S. at 340. In many situations, common sense will yield obvious answers. In this case, for example, it was reasonable to expect that the length of time the employer worked for the defendant (job tenure) would affect the employee's salary, because some of the pay raises the employer gave were across-the-board percentage increases. Therefore the statistics offered by the United States on behalf of the plaintiffs in this case did include job tenure as a variable in the multiple regression analysis.

in *Burdine*. Indeed *Teamsters* explicitly acknowledges that the employer may attack the plaintiff's case by showing that plaintiff's proof is "inaccurate or insignificant" as well as by "provid[ing] a nondiscriminatory explanation for the apparently discriminatory result" (431 U.S. at 360-361 & n.46).

In general the "variables which ought to be reasonably viewed as determinants of salary" should reflect the factors that go into the employer's own salary decisions In a disparate treatment case it is assumed that an employer is not required to make hiring, promotion or salary decisions on a basis common to most employers, or on any given basis. Title VII requires only that the basis of decision be nondiscriminatory. *Burdine*, 450 U.S. at 258-259; *St. Marie* v. *Eastern R.R. Ass'n*, 650 F.2d 395, 399 (2d Cir. 1981). Thus, for example, if the defendant chooses to give raises on the basis of job attendance, the plaintiffs' regression analysis should include job attendance as a variable.[24]

In disparate treatment cases where the parties dispute whether a particular factor or variable "ought to be reasonably viewed as [a] determinant[] of salary" (Pet. App. 391a), if that dispute is not resolved before trial, one party or the other may be seriously disadvantaged by the trial court's ruling on that issue. If plaintiff's regression does not account for the variable and the district court rules that its inclusion was required as part of plaintiff's prima facie case, plaintiff will lose unless

[24] In this hypothetical, if the plaintiff was alleging that job attendance records had been kept in a discriminatory fashion, plaintiff's regression analysis need not include this "tainted" variable, *so long as* plaintiff offered some proof that attendance records were tainted by racial discrimination. See note 34, *infra*.

he has prepared back-up statistics. Conversely, if the district court rules that the variable was *not* required to be included, a defendant who had been relying on the inadequacy of plaintiff's case will lose if he had not prepared counter-statistics. But these harsh results are not inevitable. A preliminary judicial determination of the nondiscriminatory factors that are to be subjected to analysis will greatly aid in eliminating evidentiary and burden of proof problems because it will focus the court's and the parties' efforts on the same data from the outset. This approach will preclude wasted efforts (an important consideration because of the exceptional time and expense involved in preparing multiple regression analyses) and post hoc reallocation of burdens. We therefore urge, as a corrollary to the "reasonableness" standard we have outlined, that district courts be encouraged to make formal determinations at the earliest possible stage of proceedings as to the required (for the plaintiff) and permissible (for the defendant) data to be included in multiple regression analysis offered at trial. See Finkelstein, *Regression Models in Administrative Proceedings*, 86 Harv. L. Rev. 1442 (1973).

B. The Court Of Appeals Erred In Analyzing The Statistical Proof Offered In This Case

The allocation of proof outlined in the preceding section does not place excessive burdens on plaintiffs in disparate treatment cases. Indeed, application of these standards to the facts of this case compels the conclusion that the multiple regression analyses employed on behalf of petitioners, in conjunction with the other evidence introduced, proved racial discrimination in salaries.[25] Although the nondiscriminatory variables on which the courts below focused are generally ones that should be

[25] We submit that petitioners established a prima facie case; that the Service did not successfully produce probative rebutting evidence; and that the petitioners therefore sustained their burden of persuasion. In accordance with *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1983), we now focus on the evidence as a whole.

considered in an analysis of salary, the courts erred in their examination of these factors in the particular circumstances of this case.

The United States' expert prepared multiple regression analyses concerning salaries for the years 1974, 1975 and 1981. Certain of these regressions used four independent variables—race, education, tenure, and job title. This model reflected the deposition testimony of a Service official who stated that the most important factors in determining salaries were tenure, job title, education degree and job performance (see page 5, *supra*); the model omitted only the factor of job performance, which was accounted for by other evidence in the case.[26] The regressions showed that in 1974 the average black employee earned $331 less than a white employee with the same job title, education and tenure (C.A. App. 1601, 402-403), and that in 1975 the disparity was $395 (C.A. App. 1589, 416).[27] Both of these racial disparities were statistically significant (C.A. App. 402-403, 416).[28]

The Service introduced multiple regression analyses prepared by its expert for the years 1975 and 1981. Using the *same model* that the petitioners had used, respondents' expert obtained substantially the same result for 1975, a statistically significant racial effect of $384

[26] See pages 32-33, *infra*.

[27] Contrary to the district court's suggestion (Pet. App. 136a-139a), the inclusion of county chairmen in the data base did not distort the results of these regressions. Job title was included as a variable in the critical regressions, and therefore the salaries of county chairmen were only compared with those of other county chairmen—and the salary claims related only to the salaries of agents.

[28] The regressions for 1981 showed a smaller disparity which lacked statistical significance (C.A. App. 1578). The lack of a significant racial disparity in 1981 affects, at most, the *relief* to which plaintiffs are entitled; it does not affect the Service's *liability* for the post-Act violation of Title VII established by the 1974 and 1975 regressions, whether or not the pattern and practice of salary discrimination demonstrated for those years continued at the time of trial in 1981.

(C.A. App. 1716 (analysis 5), 1711-1712). Respondents also introduced regressions adding quartile rank as an independent variable. Doing so for 1975 actually *increased* the amount of the racial effect to $475—again a statistically significant result (C.A. App. 1716 (analysis 6), 1713-1714).

Thus, the statistical evidence offered by respondents actually bolstered petitioners' case rather than rebutting it. Taken together, the regressions accounted for all of the elements respondents themselves identified during discovery as the most important determinants of salary: job level, tenure, education and quartile rank.

Nevertheless, respondents criticized petitioners' statistical case as inadequate, listing additional variables which they hypothesized might, if included, have an effect on the racial disparities demonstrated by the regressions. As we demonstrate below, however, none of the "omitted variables" provides an appropriate basis for determining that petitioners had not met their burden of proof.

1. The only variables specifically discussed by the panel majority are those relating to differences among counties as to salaries (Pet. App. 387a-390a).[29] It is undisputed in this case that salary levels varied among the various counties and thus the court of appeals is correct that such a major salary-affecting variable should have been accounted for as part of petitioners' case in chief.[30] The court erred, however, because it failed to

[29] The majority stated (Pet. App. 390a):

> The across-the-board and percentage pay increases granted by a county, as well as counties which simply pay higher salaries, also are bound to flaw the regression analyses since they were not taken account of. It is also apparent that percentage pay raises from whatever source will magnify any existing disparity.

This discussion relates to items (2), (3) and (7) on the defendants' list of omitted variables (see note 10, *supra*), and may also relate to items (4) and (6).

[30] Although it is not necessary to reach the issue in order to decide this case, it is arguable that petitioners should be excused from including this variable in their regression analyses because until the brink of trial the Service did not identify inter-county salary variance as a major factor influencing salary. The multiple regression analyses introduced at trial included variables the Service identified during discovery as the primary factors affecting salary (see page 5, *supra*). Respondents criticized the omission of other variables from these regressions, variables that they had listed for the first time a few days before trial in response to our motion for summary judgment on the salary issue (Def. Response filed Nov. 27, 1981). The court stated that the regressions sufficed to establish a prima facie case of salary discrimination, and indicated that petitioners would prevail unless the Service established that the introduction of other variables into the analyses would eliminate or reduce the disparities shown (see note 6, *supra*). Trial proceeded on that basis, and the Service failed to meet its burden. Nevertheless, the district court entered judgment for the Service on the salary claim, stating that the plaintiffs "had probably made out a prima facie case," but that the Service had rebutted that case by meeting its "burden of articulating plausible reasons for its actions * * * which the court found convincing" (Pet. App. 190a). This post hoc reallocation of the burdens of proof raises serious questions of procedural fairness in this case. Cf. *Keyes* v. *School District No. 1*, 413 U.S. 189, 209 (1973).

recognize that the county-by-county disparities *were* accounted for by petitioners' evidence, albeit not in the multiple regression analyses.

The United States introduced unrebutted evidence that removed county differences as a possible explanation for the racial disparities in salaries shown by the regression analyses. This evidence included: (1) an exhibit establishing that black employees were not located disproportionately in the low-contributing counties (C.A. App. 189, 1611-1623); and (2) intra-county comparisons showing dozens of examples of black agents who were paid less than their white counterparts (C.A. App. 1563-1567 (exhibit based on 1973 data), 189-190 (proposed findings)). In addition, the same pattern—whites earning more than blacks in the same county who had the same or superior job title, tenure and education level—was shown in exhibits introduced by respondents (C.A. App. 1626-1680; DX 67).

The court of appeals majority completely failed to acknowledge this evidence. Yet, as Judge Phillips pointed out in his dissent, such evidence "completely undercuts [respondents'] suggestion * * * that the regression analyses were flawed because of different salary levels from county to county" (Pet. App. 455a n.137; see also Pet. App. 454a & n.136). Accordingly, the evidence shows clearly that the majority erred in using the issue of salary differences among counties as a ground for discounting the results of the regression analyses because overall salary differences among counties did not explain the lower salaries of black agents.

2. The district court stressed job performance as the most important factor determining post-entry salaries (Pet. App. 134a, 141a). According to the district court, "neither side" incorporated job performance in its regression analyses (Pet. App. 134a). This was a primary reason the district court refused to credit the regression data (Pet. App. 141a).

The district court clearly erred in this ruling, and the court of appeals improperly sustained that error. As stated above, regression analyses prepared by respondents' own expert included the quartile rank measure of job performance.[31] Inclusion of the quartile measurement resulted in an *increased* racial effect for 1975,[32] thus supporting the claim of salary discrimination.[33] Of course, it does not matter that this proof came into the case as part of the respondents' evidence. After a full trial on the merits a reviewing court looks to the evidence as a whole. *United States* v. *Aikens*, *supra*.[34]

[31] The Service's method of evaluating job performance is its quartile system under which, each year, the respective district chairmen place each agent in one of four quartiles (C.A. App. 283-284). Quartile rank is used as the basis for awarding merit raises, with agents in quartile I receiving the highest salary increases (C.A. App. 1382-1387). There are no numerical ratings or rankings within a quartile (Pet. App. 113a-114a), so the only feasible measure of job performance is quartile itself.

The validity of the quartile system under Title VII, although not raised in the petitions for certiorari, was a separate issue in the courts below. The court of appeals held that quartile ranks were assigned in a nondiscriminatory manner (Pet. App. 391a-397a). According to the court of appeals majority, this finding meant that there was no discrimination in awarding merit salary increases. In reaching that conclusion, the majority did not mention the Service's 1975 regression which included quartile rank and thereby increased the race effect. Moreover, as Judge Phillips pointed out in his dissent (Pet. App. 452a n.135), even if the quartile system itself was valid, it by no means follows automatically that the process for determining salaries (including merit increases) was nondiscriminatory.

[32] However, inclusion of quartile rank significantly *decreased* the disparity for 1981 ($310 to $142) (C.A. App. 1713-1714, 1716). As was true of the United States' regressions for 1981, the Service's regressions for that year, both with and without quartile rank, showed racial effects that were not statistically significant (C.A. App. 1691-1692, 1700, 1701).

[33] Quartile rank is pertinent to other items on the Service's list of variables that allegedly should have been included in petitioners' regressions: "merit raises provided by the state," and "merit raises provided by the counties with * * * participation * * * by Extension Service personnel" (Pet. App. 133a). Merit increases—whether provided by the state or a county—are, according to respondents, based on quartile rank (Pet. App. 112a-115a (state); *id.* at 110a-112a (county)). Item (5) on the Service's list is "merit raises provided for by the counties in which Extension Service personnel have no input." There is no factual basis for the daitrict court's finding (Pet. App. 133a) that merit raises have been made in that manner, as the court of apeals seems to have acknowledged (Pet. App. 361a n.2).

[34] Job performance is, of course, normally related to salary and thus should be controlled for in a regression analysis, at least where, as here, the employer considers job performance in making salary determinations. Here, however, the only feasible measure of job performance—quartile rank—was itself alleged to be discriminatory. In our view a plaintiff should not be excused from including an otherwise important factor in his multiple regression analysis by merely *alleging* that the factor is itself discriminatory. A plaintiff must in addition make at least some showing, through statistics or otherwise, that the factor he excludes from his analysis is in fact discriminatory. If a plaintiff is not required to negate the significance of directly relevant, omitted variables, this effectively creates a presumption that the variables that were excluded because they *may* be "tainted" by discrimination are *in fact* being applied in a discriminatory manner. Such a burden of proof simply assumes the

3. The last two items on the Service's list relate to prior experience.[35] Here, the Service had no existing standard and produced no evidence whatsoever relating to the kinds of experience, if any, that are relevant to extension work or affect salary levels (see C.A. App. 928-930; GX 166, at 52-53).[36] As a result, there is no basis for measuring the prior experience of Service employees or for including that factor in a regression.[37]

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conclusion that the defendant has discriminated with respect to factors affecting salary. If a plaintiff is to be excused from including numerous variables that are most directly related to salary because those variables are susceptible to discriminatory manipulation, he must also be required to provide supplementary evidence to support the claim that those variables have been so manipulated.

In this case petitioners *did* seek to prove that the quartile system was applied in a discriminatory manner, by offering evidence separate from the multiple regression analyses. Pet. App. 115a-116a. The correctness of the court of appeals' determination that quartile ranks were assigned in a nondiscriminatory manner is not presented for decision by this Court. And there also is no need to determine whether the showing made was sufficient to excuse petitioners from including quartile rank in their regression analyses because, as stated in the text, the respondents included quartile rank in their regressions.

[35] These items are "[p]rior and relevant experience" (item 8)) and "[v]ariations in salary due to market demands both at time of hire and later for agents with skills in short supply or prior experience" (item (9)) (Pet. App. 133a-134a). The latter item is, as the district court recognized (Pet. App. 134a), "difficult if not impossible to measure and quantify."

[36] This case is, in our view, distinguishable from *Segar* v. *Smith*, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, No. 84-1200 (May 20, 1985) on this basis. In *Segar*, which involved the assignment of new employees to different job levels (GS-7 or GS-9), the federal agency had a written standard as to prior experience qualifying an employee for placement at the higher level (see 738 F.2d at 1275). Under those circumstances, as we pointed out in our petition for certiorari in that case, prior experience is one of the factors normally expected to explain salary differentials and therefore should be included in plaintiffs' regression analyses as part of their prima facie case.

[37] The United States placed into evidence Service personnel files including applications which list the employee's pre-hire work history (GX 63). Analysis of those applications shows that black agents averaged more years of pre-hire experience than did white agents (C.A. Br. Table 6, at 9a). Many black witnesses described their prior experience, and much of it was directly related to extension work (see, *e.g.*, Tr. 34, 627-629, 867, 924).

In sum, the court of appeals majority erroneously refused to accept the multiple regression analyses (proffered by both petitioners and respondents) as proof of racial discrimination. The regressions, along with the other evidence discussed above, did establish racial discrimination in salaries, and, accordingly, petitioners should have prevailed on this claim.

III. THE SERVICE RETAINS JOINT RESPONSIBILITY FOR THE SELECTION OF COUNTY CHAIRMEN, AND IS THEREFORE LIABLE UNDER TITLE VII FOR DISCRIMINATION IN THOSE SELECTIONS

The private petitioners invite this Court to consider whether Title VII permits an employer to delegate its hiring decisions to a third party which invariably acts in a discriminatory manner (85-93 Pet. 49-55). We submit, however, that this question is not properly presented here. The court of appeals concluded that the Service was not "separately responsible" for the selection of county chairment (Pet. App. 412a). It also noted, however (Pet. App. 403a), that "the agreement of the Extension Service and the County Commissioners is required in order to fill the [county chairman] vacancy." The district court explicitly so found: "all appointments are worked out jointly between the Extension Service and the [county] commissioners and no official action can be taken unilaterally by either party" (Pet. App. 77a). No party challenged this finding on appeal, and it is well supported by the record (see, *e.g.*, J.A. 163; C.A. App. 1690). The only question properly presented in this context is thus whether each participant in a joint employment decision must comply with the dictates of Title VII. It requires no extended analysis to demonstrate the fallacy of permitting each participant to avoid liability solely by showing that it shared the decision with another. *E.g.*, *Farmer* v. *ARA*

Services, Inc., 660 F.2d 1096, 1104 (6th Cir. 1981); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); see *Atonio* v. *Wards Cove Packing Co.*, 768 F.2d 1120, 1125 (9th Cir. 1985); cf. *McDonald* v. *Sante Fe Trail Transp. Co.*, 427 U.S. 273, 284-285 (1976). It was accordingly inappropriate for the court of appeals to focus on the statistics regarding the applicants identified by the Service for consideration for promotion, rather than on the statistics with respect to the final choices that were made.[39] In sum, a remand for reconsideration of the appropriate statistics may be warranted, but this record provides no occasion for consideration of an employer's liability for decisions made without its participation.

If the Court nevertheless reaches the issue urged by the private petitioners, we submit, for the reasons explained in our petition, that *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375 (1982), makes clear that an employer cannot properly be held vicariously liable under Title VII.

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[39] See note 12, *supra*. The court did refer briefly to the ultimate success rates of black and white applicants, and determined, "[u]sing the district court's method of calculation," that the relative rates did not raise an inference of disparate treatment (Pet. App. 416a), but the court used incorrect figures in calculating those rates. The court's analysis was also flawed by its inclusion of positions for which there were no white applicants while excluding positions for which there were no black applicants; of the 5 blacks selected, only 2 were in competition with a white applicant, in each case a white female (see note 8, *supra*). In addition the court failed to take account of the fact that although the Service in the vast majority of cases recommended only a single candidate to the county, it never recommended a black candidate without also recommending a white candidate, if one was available. In each instance where both a white and black candidate were recommended, the white candidate was always selected even though the stated reason for recommending more than one candidate was that they were equally qualified (C.A. App. 914-915).

IV. PRIOR SEGREGATION IN THE 4-H AND EXTENSION HOMEMAKER CLUBS WAS FULLY CURED BY RESPONDENTS' ADOPTION OF A GENUINELY NONDISCRIMINATORY ADMISSIONS POLICY

The narrow legal question raised by private petitioners is whether a state actor has failed, as a matter of law, to satisfy its affirmative duty to desegregate a formerly *de jure* system because it retained a free choice admissions system the result of which is that some all white and all black 4-H and extension homemaker clubs continue to exist (85-93 Pet. i-ii, Question 3).[40] There is no issue in this Court concerning either the validity of the lower courts' factual conclusion that the 4-H and extension homemaker clubs have been operated in a purely nondiscriminatory manner since at least 1965, or that the respondents have taken no action designed to perpetuate the prior segregation or otherwise to have a segregative effect.[40]

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[40] The precise extent of racial mixing within the 4-H and extension clubs is unclear. Between 1972 and 1980, the total number of integrated (at least one member of a different race) 4-H Clubs in mixed communities grew from 586 to 1442, while the number of single race units in mixed communities remained fairly constant (892 in 1972; 880 in 1980) (C.A. App. 1807, 1140). Of all participants in 4-H Clubs in the state, 15.7 percent belong to these 880 one-race clubs (GX 11). As of 1972, the last year for which statistics are contained in the record, only 22 out of 1966 homemaker clubs were integrated (J.A. 103).

[40] The court of appeals found that "[t]he record is totally devoid of any proof of discrimination with respect to services provided by any 4-H or Extension Homemaker Club" (Pet. App. 424a n.128). The district court likewise found no evidence of any discrimination in services or membership (Pet. App. 165a-185a) and found that any racial imbalance existing among the clubs resulted exclusively from the wholly voluntary and unfettered choice of private individuals (Pet. App. 172a). On this basis, the district court distinguished two other cases which found segregated extension-related clubs had not been dismantled (Pet. App. 175a). Specifically, the district court noted "that the Extension Service has had a policy that all voluntary clubs be organized without regard to race and that each club certify that its membership is open to all persons regardless of race; that it instructs its agents to encourage the

Accordingly, we agree with the court of appeals' conclusion that the "mere existence of all white and all black 4-H and Extension Homemaker Clubs in some racially mixed communities violates neither Title VI nor the equal protection clause of the Fourteenth Amendment" (Pet. App. 424a n.128).[41] Prior decisions of this

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formation of new clubs without regard to race; that it publishes its policies in the media; that all of its club work and functions above the local community level are being conducted on a fully integrated basis; that its 4-H camps are fully integrated and have been for over ten years and that no person has been denied membership in any club on account of race" (Pet. App. 181a). The district court found that "[i]n working with the clubs all [Extension] agents work across racial lines" (Pet. App. 168a n.53). Although the United States and private petitioners introduced evidence that the Service had assigned agents to clubs on a racial basis until 1974 (J.A. 138-139; Tr. 1078-1079, 1994-1995, 2019-2020, 2025), they did not present the district court with a proposed finding of fact on this subject. We do not understand petitioners to argue that the court's findings were clearly erroneous, or that the Service has taken any action after the de jure period that has "serve[d] to perpetuate or re-establish the dual * * * system." *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 460 (1979). No evidence relating to the racial composition of clubs formed after the de jure period was introduced at trial, because neither the United States nor private petitioners drew any distinction between clubs formed before or after this period.

[41] The discrimination prohibited by Title VI is coextensive with that proscribed by the Constitution; our discussion will therefore address this question in terms of constitutional requirements. *Guardians* v. *Civil Service Commission*, 463 U.S. 582 (1983). The United States Department of Agriculture has promulgated regulations pursuant to Title VI which require that federal aid recipients that have "previously discriminated against persons on the ground of race, color or national origin, * * * must take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. 15.3(b)(6)(i). As discussed in the text *infra*, where, as here, admissions are traditionally the product of private voluntary choice, an entity covered by Title VI has fulfilled this requirement to take affirmative action to overcome the effects of prior segregation in admissions when it has established a genuinely nondiscriminatory admissions system. Since the regulation simply embodies this statutory and constitutional requirement, the lower courts' conclusion

Court in the school desegration area demonstrate that a state which has insured that all its practices relating to admissions are truly race-neutral need not assure a par-

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that the Service has created such a nondiscriminatory system in the 4-H and extension homemakers clubs establishes that it is in compliance with these regulations.

The Department of Agriculture sent affirmative action "guidelines" in 1972 and 1973 to the Directors of all Extension Services expressing the Department's views concerning steps those Services should take with respect to desegregating 4-H and extension homemaker clubs. These guidelines, on their face, specifically exempt the respondent Extension Service from coverage because of the pendency of this litigation (Pet. App. 173a n.55; C.A. App. 1905, 1914-1958). It is also undisputed that these guidelines are, in any event, nonbinding. The stated purpose of these guidelines is to set forth standards by which Extension Services will "assure that all Extension 4-H and other youth programs * * * are provided to all clientele on a nondiscriminatory basis without regard to race, color, or national origin" (C.A. App. 1941; see also C.A. App. 1923, 1864-1865, 1888). To accomplish this goal of nondiscrimination, the guidelines state that formerly segregated Extension Services should establish "that *all reasonable efforts have been made* to recruit individuals from all racial groups represented; and reasons for individuals not desiring to become members of such clubs in interracial settings are not based upon race, color or national origin" (C.A. App. 1905 (emphasis in original)). Respondents did not institute one of the recruitment efforts specified by the Department as part of their affirmative effort to ensure nondiscrimination: personal visits by Extension staff members to potential minority participants in the clubs (C.A. App. 1910). As a general enforcement policy, the guidelines' "personal visit" standard is an appropriate and beneficial recruitment measure to assure both the Department and the covered Extension Service that all persons are aware that clubs are truly nondiscriminatory, so that the "reasons for individuals not desiring to become members of such clubs in interracial settings are not based upon race." However, this component of the Department's affirmative action program is not an absolute prerequisite to finding that the clubs are truly nondiscriminatory. The district court's findings of nondiscrimination and that any racial imbalance is solely attributable to the free choice of persons unfettered by subtle racial barriers are not clearly erroneous. For this reason, the United States did not appeal the district court's decision on this issue.

ticular racial mix [42] or eliminate personal choice in order to cure its prior segregation.

It is well established that the Constitution does not require, either as a matter of substantive right (*e.g.*, *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 433-434 (1976); *Spencer* v. *Kugler*, 404 U.S. 1027 (1972)) or as a matter of remedy (*Milliken* v. *Bradley* (*Milliken I*), 418 U.S. 717, 740-741 (1974); *Swann* v. *Bd. of Educ.*, 402 U.S. 1, 24 (1971)), any particular degree of racial balance in a state's activities. Rather, the Constitution requires that government refrain from any action intentionally designed to exclude or segregate persons on the basis of race. *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton I*), 433 U.S. 406, 413 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). It is not disputed that the Service engaged in such deliberate segregation after this Court's decision in *Brown* v. *Bd. of Educ.* (*Brown I*), 347 U.S. 483 (1954), and thus "automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory * * * system.'" *Keyes* v. *School District No. 1*, 413 U.S. 189, 200 (1973), quoting *Brown* v. *Bd. of Educ.* (*Brown II*), 349 U.S. 294, 301 (1955).[43]

Such remedial efforts are necessary "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" (*Milliken I*, 418 U.S. at 746) by eliminating the condition that violates the Constitution and the conditions that flow from such a violation. *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977). See *Dayton I*,

[42] Although private petitioners do not expressly state that any particular racial mix is required, their assertion that the state's efforts have "failed" (85-93 Pet. i-ii) can only be premised on the assumption that some degree of racial mixture is necessary for "success".

[43] It is also undisputed that it was the *state's* deliberate action that caused intentional segregation in the clubs and thus constituted "state action" governed by the Fourteenth Amendment. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

433 U.S. at 417, 420.[44] Since the condition that offends the Constitution is a race-conscious admissions policy, not the absence of racial balance, the prior constitutional violation with respect to admissions is fully cured by establishing a system of admissions that "exclude[s] no [person] of a racial minority, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23.[45] Accordingly, a unitary system of admissions is one "within which no person is to be effectively excluded from any [club] because of race or color." *Alexander* v. *Holmes*, 396 U.S. 19, 20 (1969). Accord, *Green* v. *School Board*, 391 U.S. 430, 432 (1968), quoting *Brown II*, 349 U.S. at 300-301 (formerly segregated school systems must "'achieve a system of determining admission to the public schools on a nonracial basis.'"); *Brown II*, 349 U.S. at 300 ("At stake is the personal interest of the plaintiffs

[44] Both *Milliken* cases, like other cases cited above, concerned limitations on the remedial discretion of federal courts in segregation cases, and not what a state actor such as respondent must do in order to cure prior segregation. These cases, nevertheless, established the outermost bounds of desegregation remedial efforts because they involved the question of whether a district court has exceeded its authority by fashioning a remedy which goes beyond the "nature and extent of the * * * violation." *Milliken I*, 418 U.S. at 744. In defining the limitations on judicial remedial authority, however, these cases do not establish that every defendant must take every step a court could possibly order to cure past discrimination. For example, a district court would be authorized to require intensive affirmative recruitment efforts to cure prior discrimination. However, a state defendant that has not performed such recruitment in all particulars will nevertheless have complied with the Constitution if it arrives at the same end: nondiscriminatory admissions. (See note 41, *supra*.)

[45] Of course, a system does not become unitary in all respects simply by curing its prior discriminatory *admissions*. Rather, it must remedy all aspects of the system that have been affected by such discrimination. In the public school context this would include faculty, facilities, and the other so-called "*Green* factors." See *Green* v. *School Board*, 391 U.S. 430, 435 (1968). Our discussion is expressed in terms of admissions only because we do not understand the private petitioners to contend that the Service has not fulfilled its affirmative duty with respect to the formation of clubs or any other aspect of the clubs' programs.

in admission to public schools • • • on a nondiscriminatory basis").

To be sure, in the elementary and secondary school context, achievement of the truly race-neutral admissions scheme necessary to remedy prior segregation requires more than discontinuance of discrimination if the former unconstitutional practices have created a race-based assignment system that remains in place. Simply ending de jure segregation and returning to a neighborhood school system often will not restore the conditions that would have existed absent prior segregation, and thus will not effectively dismantle the dual system. In such school systems, student attendance districts often have been racially gerrymandered, schools may have been purposely constructed in a particular area to achieve artificial racial separation, and the location of segregated schools may well have significantly contributed to segregated residential patterns. *Swann*, 402 U.S. at 25, 28. In these circumstances, assigning students to their neighborhood school does not place students—either those who attended school during the period of de jure segregation or those who will subsequently enter the system—in the desegregated school environment (or actual school) that they would have experienced absent such prior unconstitutional actions. Accordingly, "[w]hen school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments." *Id.* at 28. To do otherwise would perpetuate the prior de jure segregation by leaving intact conditions that are directly attributable to the unconstitutional actions of state actors.

Where the state has not *assigned* persons during or after the de jure period, however, the process of disestablishing the dual system through achievement of a neutral admissions policy can be more directly accomplished. Where public officials do not assign persons to a particular program, there is no state-controlled attendance pattern, discriminatory or otherwise, to undo or

redraw. Thus, unlike elementary and secondary education, affirmative action to assure a genuine and complete termination of all discrimination in activities affecting admissions will not leave in place any discriminatory conditions caused by previous state-imposed segregation. Such a genuinely race-neutral policy will, absent any subsequent conduct that contributes to segregation, fully dismantle the dual admission system because it will restore to the victims of discriminatory conduct (and provide to others) the system mandated by the Constitution, *i.e.*, one in which each person has an equal opportunity to participate in government activities free from discrimination and racial separation attributable to state action.

This is not to say that a voluntary attendance system is unitary with respect to admissions because the state entity simply announces that it will henceforth conduct admissions without regard to race. Rather, such a formerly segregated government program is unitary only if the state has, in fact, established an admissions "system in which racial discrimination [is] eliminated root and branch." *Green*, 391 U.S. at 438. Thus, the relevant program must be free from all practices that either indicate that the program is not genuinely open to all free from subtle discrimination or that otherwise create further racial separation.

This transition will normally involve diligent oversight and remedial efforts to ensure that the defendant's existing administrative and admissions practices are not tainted by discrimination, and do not send a subtle discriminatory message, that its personnel are sensitized to the need to treat applicants and potential applicants in a wholly nondiscriminatory manner, that its present and future practices do not have the effect of impeding desegregation, and that it is made clear to all that any practices discouraging or diminishing racial mixing are truly a thing of the past. Such affirmative action by the state will ensure that a genuinely race-neutral admissions policy has been achieved, and that any subsequent racial im-

balance is thus not due to actions attributable to public officials, but to the truly free exercise of choice by private actors unaffected by subtle discriminatory exclusion."[46] Against the backdrop of recent blatant discrimination, affirmative recruitment activities in the media or otherwise will normally be an important component in this nondiscrimination effort, but the ultimate question in every case is whether the state's policies and practices are conducted in a manner that does not exclude or segregate any person on the basis of race.

In this case, as noted, the lower courts found that the respondents had fully cleansed the clubs of any such racially-based activities and that racial imbalance is solely the product of unfettered private action (see note 40, *supra*). Private petitioners do not maintain that these concurrent findings of fact are erroneous or that the respondents engaged in any action that had a segregative effect. Accordingly, for the reasons stated above, we believe the lower courts' determination that such racial discrimination had been eliminated from the system "root and branch" establishes that respondents had fully performed their duty to redress prior segregation.

The Service was not required to attain a particular racial mix in its system, regardless of whether private actors continued to retain the freedom to choose which, if any, club to attend. De facto segregation that is purely the product of private decision making, and thus not at-

[46] The 4-H and extension homemaker clubs are not actually a part of the Extension Service, so the precise form of respondents' affirmative remedial duty is somewhat different, although no less compelling, than a state actor that must cure its own internal practices. With respect to admissions, the respondents are obliged to take affirmative action to ensure nondiscrimination against club members by the private voluntary leaders of those clubs. For example, with respect to the sole instance of discrimination by a voluntary worker in the record, the Service promptly removed the worker and admitted the black child to the 4-H Club (Pet. App. 167a n.51). Of course, the Service must also ensure that its own actions related to these clubs—formation of clubs, recruitment of leaders, provision of services—are nondiscriminatory and are not used as devices to perpetuate segregation.

tributable to any action by the state, is not proscribed by the Constitution. *Dayton I*, 433 U.S. at 413. That being so, such racial imbalance need not be eliminated in order to render an admissions system fully desegregated if the government entity has established a genuinely race-neutral admissions pattern.

This Court's decision in *Spangler* makes this clear. There the district court's adoption of a student assignment plan to remedy public school segregation "established a racially neutral system of student assignment in the [school district]." 427 U.S. at 434. After the first year of this plan's implementation, free movement of persons within the district "resulted in some changes in the demographics of [the district's] residential patterns, with resultant shifts in the racial makeup of some of the schools." *Id.* at 436. "[A]s these shifts were not attributed to any segregative actions on the part of the [school district]" (*ibid.*), the racial imbalance caused by these voluntary choices of private citizens did not mean that the district had failed to perform its duty to remedy prior segregated student assignments. Consequently, the district court's requirement that the defendants engage in additional remedial admissions practices was impermissible because it enforced a right not secured by the Constitution, *i.e.*, the "'substantive • • • right [to a] particular degree of racial balance or mixing.'" *Id.* at 434, quoting *Swann*, 402 U.S. at 24. "For having once implemented a racially-neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previously racially discriminatory attendance patterns." 427 U.S. at 437.

Thus, just as the *Spangler* school board's adherence to the district court's racially neutral student assignment plan fully redressed previously segregated admissions notwithstanding a racial imbalance due to the voluntary decisions of private individuals, so too does the respondents' establishment of a nondiscriminatory system here

fully remedy the prior constitutional violation regardless of whether private activities beyond their control result in an absence of racial mixing. To conclude otherwise would be to equate racial balance with effective desegregation; an equation that, as noted, *Swann* and *Spangler* expressly rejected.

This principle obtains with equal force in situations where private choice, rather than official compulsion, is the means by which attendance is determined. The holding and analysis in *Green* and its companion cases (*Raney* v. *Bd. of Educ.*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968)) is limited to compulsory public education or other contexts where the government, rather than the participant, traditionally makes the decision concerning where participants in the government program will attend. Thus, *Green's* rejection of "freedom of choice" student assignment plans simply reflects the familiar rule that a system which has not yet achieved unitary status may not take steps that foster segregation where there exists a reasonably available alternative that equally or better serves the governmental purpose purportedly being furthered. And, while the "freedom of choice" plan at issue in *Green* was plainly such a segregation-inducing device, the same is not true where, as here, such private choice is the norm.

In public elementary and secondary schools, the decision whether to attend and which school to attend is virtually always made by the school district, not by the student. Accordingly, adoption of a "free choice" or "free transfer" plan which is used or operates to perpetuate the separation of the races is impermissible, at least absent persuasive justification. Utilization of such an unusual and administratively awkward admissions scheme in preference to the traditional, more efficient mandatory assignment system creates the inference that, at a minimum, the defendant school district is not striving in good faith to establish a student attendance system that is truly free from racial considerations. In such circumstances, then, it is the school officials' abdication of their normal responsibility to assign students that causes or at

least fosters segregation. Such segregation is thus directly attributable to the state, not to private actors. In short, a non-unitary school district's adoption of a "freedom of choice" plan that predictably, if not designedly, results in greater segregation than the traditional and reasonably available mandatory assignment alternative violates the district's affirmative responsibility to refrain from adopting policies that "serve to perpetuate or reestablish the dual school system" (*Columbus Bd. of Educ.* v. *Penick*, 443 U.S. at 460) in preference to less segregative and equally legitimate policies. See *Swann*, 402 U.S. at 20-21; *Columbus*, 443 U.S. at 460-462. In our view, it was precisely for this reason that the "free choice" and "free transfer" plans were struck down in *Green* and *Monroe*.

Noting that normal geographic zoning assignment was a "reasonably available" option that would greatly increase integration, the *Green* court held that a school board's preference for an attendance scheme such as "freedom of choice" "may indicate a lack of good faith; and at the least it places a heavy burden upon the Board to explain its preference for an apparently less effective method." 391 U.S. at 439. Since the use of a "free choice" plan in these circumstances clearly served no legitimate purpose particularly given the procedural and historical context in which the plan was adopted (*id.* at 432-433, 440 n.5), the school board in *Green* was unable to meet this burden. Indeed, " 'it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning.' " 391 U.S. at 442 n.6, quoting *Bowman* v. *County School Board*, 382 F.2d 326, 332 (4th Cir. 1967) (concurring opinion).

In *Monroe*, this Court was even more explicit. In that case, the "free transfer" option allowing students to transfer after initial geographic assignment, "permitted the 'considerable number' of white or Negro students in at least two of the zones to return, at the implicit invita-

tion of the Board, to the comfortable security of the old, established discriminatory pattern * * * no attempt has been made to justify the transfer provision as a device designed to meet 'legitimate local problems'; rather, it patently operates as a device to allow *resegregation* of the races to the extent desegregation would be achieved by geographically drawn zones." 391 U.S. at 459, quoting *Goss* v. *Bd. of Educ.*, 373 U.S. 683, 689 (1963) (emphasis in original).

No such constitutional infirmity attaches to the continuance of free choice in those situations where such choice is a traditional aspect of the government program or activity. In contexts such as public parks, higher education and the 4-H Clubs here, participation or attendance in the state activity is wholly voluntary in all respects. Unlike public schools, free choice as to whether and where to attend is a normal and important feature of the system—not, as in the public elementary and secondary school context, a newly discovered device that will clearly have a segregative effect. In such cases, a transition to officially compelled assignments would constitute a fundamental alteration of the system. It would increase government regulation of private conduct by denying individuals the liberty to attend, for example, the park that is most convenient or the university best suited to their educational needs. Accordingly, preservation of the participants' traditional "free choice" cannot reasonably be viewed as an act of bad faith or a device that encourages or perpetuates segregation. To the contrary it "serve[s] important and legitimate ends." *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton II*), 443 U.S. 526, 538 (1979).

Unlike the public schools in *Green* and *Monroe*, therefore, any lingering racial imbalance in the 4-H and extension homemaker clubs here is not attributable to unjustified segregative action by the government respondents, but solely to decisions freely made by private actors. That being so, neither *Green* nor *Monroe* suggests that the state has an affirmative duty in such circumstances to eliminate or restrict the discretion of private actors to achieve a greater racial balance. Nor has this Court ever

suggested such a rule in any other context.[47] Indeed, in the same term that *Green* and *Monroe* were decided, this Court summarily affirmed, over dissent, a three-judge court's decision that those cases' condemnation of "freedom of choice" plans was inapposite in the higher education context because admissions there are traditionally governed by private choice. *Alabama State Teachers' Ass'n.* v. *Alabama Public School & College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd, 393 U.S. 400 (1969).[48]

Thus, *Green* did not hold that the continuation of free choice is an inherent defect in a racially imbalanced system, but only that the adoption of such a scheme in the public school context is impermissible if it impedes or frustrates desegregation. Any contrary interpretation of *Green* "can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." *Milliken I*, 418 U.S. at 747. Such an understanding of *Green* would not only read into it a requirement for "mandatory integration" which that opinion expressly rejected (391 U.S. at 437), but also would bring that decision squarely into conflict with this Court's established precedent that no particular degree of racial mixing is constitutionally required. See page 10, *supra*.

Of course, the Service undoubtedly *could* have sought to increase integration by attempting to close one-race clubs, by denying club members the opportunity to join

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[47] For example, this Court issued a series of per curiam decisions following *Brown* which invalidated segregation in various state activities without any suggestion that the relevant public officials must do more than henceforth insure a nondiscriminatory admissions policy, *i.e.*, provide free choice. See *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (parks); *Mayor of Baltimore* v. *Dawson*, 350 U.S. 877 (1955) (beaches and bathhouses); *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Gayle* v. *Browder*, 352 U.S. 903 (1956) (public transportation).

[48] Of course, a higher education system must take affirmative remedial action not only with respect to admissions, but also for example, faculty, facilities, and lingering funding disparities before it will become unitary in all respects.

the club of their choice or by discriminatorily excluding black and white children from clubs where their race predominates through preferential "other-race" goals and quotas. We fail to perceive, however, why such actions are in any way necessary to vindicate the constitutional rights of those persons whose unfettered access to government-supported programs is being so restricted. Where a state has unlawfully segregated railroad cars, for example, the state is not constitutionally required to compel blacks to sit in the previously all-white railroad car or to restrict access to the car formerly reserved for blacks. By the same token, so long as the Service ensured equal access to the clubs and did not engage in practices that impeded desegregation, it was not required to restrict persons' normal discretion to join the club of their choice, even if those persons exercised their unfettered choice to join a club in which their race predominates.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed in part, affirmed in part, and remanded.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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Nos. 85-93 and 85-428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Were the salary claims correctly rejected when:

a) No pattern or practice of intentional racial discrimination was found by the district court and the jobs of NCAES agents were not found to be similar or typical because of county by county differences and,

b) The statistical evidence was properly rejected as being inaccurate and failing to utilize known valid non-discriminatory factors affecting each agent's salary in a different manner?

2. Were the claims of discrimination in connection with selection of county extension chairmen correctly rejected when:

a) The district court and court of appeals properly applied disparate treatment analysis requiring proof of intentional discrimination in connection with decisions to select county extension chairmen, and

b) The county chairman selection process and statistics, analyzed according to *Teamsters* and *Hazelwood* revealed no intentional discrimination in violation of Title VII and 42 U.S.C. Section 1983, and

c) The district court and court of appeals analysis of county extension chairmanship claims was not in conflict with *Arizona Governing Committee v. Norris*, 403 U.S. 1073 (1983)?

3. Were the claims of violation of Title VI in connection with the 4-H and Homemaker Extension programs correctly rejected when there was no evidence of discrimination or denial of services in connection with the programs?

4. Was class certification correctly denied pursuant to Rule 23, Federal Rules of Civil Procedure when:

a) The facts showed that NCAES employees were not similarly situated and lacked commonality in connection with their employment conditions, and

b) The facts showed that the 100 boards of county commissioners proposed as a defendant class were each independent and autonomous in connection with each county's NCAES program and employment, and

c) The case was tried as a pattern or practice case with both petitioners seeking the same relief?

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

This action was instituted in the U. S. District Court for the Eastern District of North Carolina on November 18, 1971, by more than fifty employees of the North Carolina Agricultural Extension Service (NCAES) alleging racial discrimination in employment and the provision of services by NCAES on behalf of 5 purported classes of blacks and indians. The United States was named as a defendant in the original action but was allowed to become a plaintiff and intervened in the action on April 7, 1972, under Section 902 of Title IX and Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, 2000d and 2000d-1.

The United States was permitted to amend its complaint in intervention by Order of October 9, 1979, to include allegations of a pattern and practice of racial discrimination in violation of Sections 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Class action certification sought by the plaintiffs and the United States was denied. (J.A. 73-79)

On November 23, 1981, the plaintiffs moved to amend their complaint to allege violations of Title VII and the motion was allowed. The defendants denied all allegations of discrimination. The nonbifurcated trial of this action began on December 7, 1981, and ended with final arguments on February 12, 1982. Counsel for the United States and plaintiffs acknowledged that the case was one of alleged disparate treatment and that the plaintiffs and the United States had the burden of proving a pattern or practice of intentional discrimination against the defendants. (Tr. 10,13,16). The plaintiffs and the United States joined in common cause, called over 46 witnesses to testify, and introduced over 400 of exhibits. They rested their case on December 29, 1981. (Tr. 3021, C.A. App. 49)

The defendants' case began on December 31, 1981 and the defendants called over 15 witnesses and introduced over 250 exhibits. The United States and the private plaintiffs took one day for rebuttal. (Tr. 6411-6617). (C.A. App. 102) (Tr. Vol. 32).

On August 20, 1982 and September 17, 1982, the Court entered Judgments dismissing all claims against NCAES. In its decision of August 20, 1982, the Court found as follows:

(a) That this was not a proper action to be certified as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. (C.A. App. 49) This Finding was appealed.

(b) That blacks are not discriminated against in geographical employment assignments in NCAES. (C.A. App. 53) *This Finding was not appealed.*

(c) That NCAES does not discriminate in recruitment of black professional employees. (C.A. App. 53) *This Finding was not appealed.*

(d) That NCAES does not discriminate in hiring black professionals at the county and state levels and NCAES's selection procedures are non-discriminatory. (C.A. App. 62) *This Finding was not appealed.*

(e) That NCAES does not discriminate in assignments of professional personnel to areas of responsibility (i.e. crops, livestock). (C.A. App. 64) *This Finding was not appealed.*

(f) That NCAES does not discriminate in title promotions of county level professional employees (from assistant to associate to full agent) and the performance evaluation system used in connection with promotions of county level professionals was valid, and non-discriminatory. (C.A. App. 74) *This Finding was not appealed.*

(g) That NCAES does not discriminate in the selection of county extension chairmen. (C.A. App. 101) This Finding was appealed.

(h) That NCAES does not discriminate in the selection of state level positions such as director, program leaders, specialists, and district chairmen. (C.A. App. 106) *This Finding was not appealed.*

(i) That NCAES does not discriminate with respect to terms, conditions and privileges of employment. (C.A. App. 72) *This Finding was not appealed.*

(j) That NCAES does not discriminate in connection with salaries. (C.A. App. 150) This Finding was appealed.

(k) That NCAES does not discriminate in work assignments. (C.A. App. 152). *This Finding was not appealed.*

(l) That NCAES has established valid, non-discriminatory qualifications, tests, selection standards and procedures in hiring and promotion. (C.A. App. 158) *This Finding was not appealed.*

(m) That NCAES has taken appropriate action to correct the present effects of past racially discriminatory policies and practices. (C.A. App. 163). *This Finding was not appealed.*

(n) That NCAES provides equal services to minorities. (C.A. App. 164). *This Finding was not appealed.*

(o) That NCAES' services to farmers and other persons are provided on non-racially segregated basis. (C.A. App. 164). *This Finding was not appealed.*

(p) That NCAES is not in violation of Title VI in the delivery of services to 4-H and Extension Homemaker Clubs. (C.A. App. 185). This Finding was appealed by Petitioners but not by the United States. *The United States now argues that the decision be affirmed.* (Brief U.S. p. 37-50)

(q) That the case was a disparate treatment case, and NCAES did not engage in a pattern or practice of racial discrimination. (C.A. App. 205)

In its decision of September 17, 1982, the Court analyzed the individual claims of 42 plaintiffs and determined that none were entitled to relief. (Pet. App. 215a-345a)

The United States and Petitioners appealed to the fourth circuit. The United States appealed from only *3* of the 16 adverse rulings. The plaintiffs appealed from only *4* of the foregoing adverse rulings: salaries, county extension chairmen, 4-H and Home Economics and class action denial.[1]

Decision was rendered by the court of appeals on December 10, 1984, affirming the district court's two judgments. Judge Phillips dissented on three claims, to wit: the 4-H Club claims, class action and salaries. He affirmed in all other respects. Petitions for Rehearing and rehearing *en banc* were denied by an evenly decided court on April 15, 1985.

STATEMENT OF FACTS

Preface

It is important to bring this case into proper focus and perspective. This case involved considerable time in trial and took both the district court and the court of appeals a long time to decide. A review of the district court opinions on the pattern or practice claims and the individual claims reveals careful consideration, thought and study by the district court in reaching and explaining its decision to deny all claims for relief. The United States and plaintiffs attacked each and every facet of the NCAES employment practice from initial hire to salaries and promotions. The United States and plaintiffs claimed discrimination in the services provided by the NCAES to

[1] References throughout this brief to the Court of Appeals appendix which appear in the following format: (C.A. App. 0000"B" or "Y") contain a reference to the defendants' proposed findings of fact which were marked by plaintiffs and the United States pursuant to the district court's instructions in either red, blue or yellow. "B" refers to facts which were marked in blue and means facts not in dispute. "Y" refers to facts which were marked in yellow and means facts not in dispute but considered irrelevant by plaintiffs. Copies of the defendants' proposed findings of fact marked by the United States and private plaintiffs are found in docket number 231, 232.

the people of North Carolina. Yet a review of the petitioners' briefs filed with this Court, and the Petitions for Writ of Certiorari which brought the case here do not present an accurate factual picture of NCAES or its employment practices as a whole.

Why are the facts about NCAES relating to all issues that were tried important? The answer is simple. The petitioners and the United States tried this case as a pattern or practice action under Title VII asserting claims of intentional discrimination (disparate treatment) by NCAES against blacks. At trial the evidence showed that NCAES agents, due to the structure of NCAES and county by county vacancies, were not performing the same jobs or similarly situated, whether black or white. Yet petitioners assert that white agents and black agents perform the same work and are similarly situated. Also the facts about NCAES are important because petitioners cite *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) at length in reference to the burden of proof and other issues. By sweeping the facts about NCAES and non appealed issues under the rug, they fail to state that *Teamsters* required them to prove a pattern or practice by showing racial discrimination was NCAES' standard operating procedure and usual practice. *Teamsters, supra*, 336.

The district court found (1) no discrimination in hiring (2) no discrimination in recruitment (3) no discrimination in service training (4) no discrimination in NCAES providing blacks with opportunities to secure masters degrees while employed (5) that NCAES had used a valid, non-discriminatory performance evaluation system (6) that NCAES utilized the valid, non-discriminatory performance evaluation system in promoting blacks and whites in agent positions and in determining merit salary raises (7) that NCAES did not discriminate in assignments and (8) that NCAES did not discriminate in selection of county extension chairman or any of its programs. This is further bolstered by the decision on

individual claims in which the district court carefully weighed the evidence in each case and found no discrimination. In employment, only salaries and chairmanship selection were appealed. In these two employment issues, petitioners argue that a pattern or practice of discrimination was the regular standard operating procedure while omitting to mention that no regular systemwide pattern or matter of discrimination was found.

Petitioners have elected to omit the total picture from their arguments and to rest on the inaccurate claim that white agents and black agents perform the same jobs in similarly situated environments as if NCAES were a factory setting. Because of this, a review of the facts relating to NCAES's organization, employment practices and services is required so that fair balance and equilibrium can be re-established.

Organization of the
North Carolina Agricultural Extension Service

NCAES' programs and functions are educational in nature and are of great social and economic importance to the citizens of North Carolina and the counties where they reside. NCAES' programs and areas of emphasis fall into four general categories: agriculture, home economics, 4-H youth development and community resource development (CRD). (C.A. App. 212"B").

The State of North Carolina is composed of 100 counties and the Cherokee Indian Reservation. Each county has its own governing body known as the Board of County Commissioners. The County Commissioners are autonomous. The relationship between the Boards of County Commissioners and the NCAES is set forth in a "Memorandum of Understanding" executed by each county and NCAES. (C.A. App. 212"B", J.A. 161).

Under the Memorandum of Understanding, the Extension staff recommended by the NCAES to each county must be concurred in by the County Commissioners. In all instances, the person or persons recommended by

NCAES for consideration as County Extension Chairman is approved by the Board of County Commissioners. County contributions to professional salaries vary from county to county depending on factors such as county size, county wealth and tax base, county interest in the program the agricultural or rural thrust and nature of the county itself. (C.A. App. 213, 541-50, 1683-87, 2181).

North Carolina counties vary greatly in population, rural/urban population, size, racial makeup, topography, agrarian needs and resources. NCAES determines the agricultural, 4-H, home economics and community development needs of each individual county with the help of a system of advisory councils known as the County Extension Advisory Leadership System. (C.A. App. 213-14 "Y").

Because of the wide variance among North Carolina's counties, the requirements for extension staff vary greatly from county to county. The needs of a particular county dictate the areas of subject matter responsibility and training that extension agents must possess to serve within the particular county. (C.A. App. 216 "Y"). Agents cannot be required to move from county to county nor fill an opening for which the agent is not qualified by education, training or interest to fill. (C.A. App. 216, 560-67, 599-605, 2753).

One cannot review the employment or salary situations of NCAES county level professional staff without first looking at the individual needs and the conditions of the particular county at the time that such an employment or salary decision was made. (C.A. App. 216, 510, 599-608).

The head of the Extension Service is the Director and Associate Dean of the School of Agriculture and Life Sciences at North Carolina State University. There is an Associate Director. Directly beneath the Associate Director there are five Assistant Directors of the Extension Service. (C.A. App. 217-18 "B").

There are six District Extension Chairmen. The District Extension Chairman is responsible for administering all extension personnel and programs in each of the counties within his or her district. (C.A. App. 218 "B").

The Extension Service employs specialists. A Specialist has technical expertise in a particular subject matter area and provides technical assistance at the county and/or district level. Approximately two-thirds (2/3) have Ph.D. degrees. (C.A. App. 218-19 "B").

There are twelve District Program Leaders. Each program leader has responsibility in two of the six districts in one of the program areas: (1) Home Economics; (2) Agriculture; (3) Community Development; or (4) 4-H.

There is a County Extension Chairman position in each county which is the top county administrative position. The County Chairman (CEC), is responsible for carrying out an effective county extension program. The CEC also carries particular subject matter responsibilities such as agronomy, tobacco, 4-H, or home economics depending on the needs of the county and expertise of the staff. The CEC reports to the County Commissioners and works with them on budgeting and personnel matters which require county funds and participation. (C.A. App. 220 "B").

The County Extension Agent is responsible for assigned areas of subject matter responsibility. Agents are employed to work in a particular county position for which they must apply. (C.A. App. 54). There are three ranks of Extension Agents. The first is Assistant. The second is Associate requiring 3 years of service or equivalent experience. The third is called Extension Agent and requires a minimum of seven years of service or equivalent experiences. Educational degrees may reduce service year requirements. The Assistant, Associate, and Extension Agent perform the same types of tasks within their subject matter areas such as livestock or Home Economics. When an agent is promoted, his or her responsibilities increase and a higher level of performance

is expected. (C.A. App. 221 "B", 589, 99, 1035-38, 1174-75, 2235, 2253-75).

An agent is employed to fill a vacant position, for which the agent was selected by virtue of his or her skill and training. (C.A. App. 222 "B", 54).

Most agents' and chairmen's salaries consist of a federal share, a state share, and a county share. The federal government allocates money each fiscal year. These funds are combined with funds appropriated by the General Assembly to support salaries of Extension employees. (C.A. App. 223 "B"). The NCAES in consultation with the Board of County Commissioners determines what the state's share of each agent's salary in that particular county will be and what share the county will pay. The percentage of salaries that were paid from county funds in 1981 ranged from a high of 57% in Forsyth County to a low of 18% in Camden County. This percentage variation results in differences between salaries from county to county and agent to agent. (C.A. App. 223 "B", 546-51, 598-610, 1321-24, 2181-90).

Agricultural Program

The largest program area of the NCAES is its agricultural program which educates and encourages farmers to adapt scientific methods to meet individual needs and to adjust to changing economic conditions. Approximately 47-50% of all NCAES professional time is spent on agricultural programs. (C.A. App. 47, 224 "B", 2324-25).

The agricultural programs within NCAES are determined by the needs of the particular counties and varies greatly with each individual county and region of the state. (C.A. App. 224 "Y", 226 "Y").

Petitioners alleged racial discrimination in agricultural programs but there was no evidence to support the allegations of trial. At the close of petitioners' evidence, Counsel for the government conceded that the defendants

were not discriminatory in connection with services. (Tr. 3285-6, 672).

The Extension Home Economics Program

An extension home economics program is operated in each of North Carolina's 100 counties and the Cherokee Indian Reservation. The home economics program helps families solve problems and improve the quality of their lives through educational programs. Approximately 17.5%-23% of extension professionals' time is spent in the Home Economics program. (C.A. App. 228 "B", 260, 2325).

Programs are delivered at the county level by home economics agents and volunteers. (C.A. App. 228 "B").

Special Interest groups are open without regard to race and are formed to provide short term education on a particular subject within Home Economics.

Extension Homemaker clubs are volunteer groups organized to receive an educational in home economics through agents and volunteers. Club members participate on a strictly voluntary basis. Membership is open to everyone. Some clubs have members of one race both all black and all white and some are integrated. Only about 20% of total extension home economics program relate to these clubs. (C.A. App. 233, 573-74, 1390-92).

The district court found that there was no inequality of service and memberships were entirely voluntary. No black or white member of any extension homemaker club came forward and testified there had been any discrimination in services or membership. (C.A. App. 93,96)

The district court found that NCAES has organized all phases of activity above the community club level on a completely integrated basis and all agents worked with clubs across racial lines. (C.A. App. 234, 1390, Johnson D. 56, 51).

It has been the policy of NCAES that all extension homemaker clubs be organized without regard to race.

Prior to 1970 and thereafter all extension homemaker clubs were requested to certify membership would be open without regard to race. All clubs executed such certificates and they are on file with NCAES. NCAES' home economics agents encourage the formation of clubs without regard to race. Public media and publications carry announcements of formation of clubs and state that they are open without regard to race. (C.A. App. 96, 233, 854, 858, 866-68, 876, 886-87, 973, 1003, 1393-95). The district court found no discrimination in any aspects of the program. (Pet. App. 184a-185a)

Despite the policy that extension homemaker clubs be organized without regard to race, clubs do exist with members of only one race. Recognizing that the services and benefits that NCAES should provide to individual citizens *without regard to race* NCAES decided to continue to provide support to the extension homemaker clubs which had members of only one race rather than to deprive citizens of obtaining beneficial information. The district court found that the clubs have not denied anyone membership on the basis of race nor subjected anyone to discrimination. (Pet. App. 185a)

The private petitioners appealed only with respect to one race clubs while the U.S. argues the district court was correct.

4-H and Youth Program in North Carolina

The 4-H and Youth Program in North Carolina is one of the four major educational programs of the NCAES. The 4-H program is designed to develop good character and citizenship and to teach youth useful and practical skills. (A. 235 "B").

The 4-H program operated primarily in the schools until the early 1960's when a decision was made to develop a community based 4-H program. Since the early 60's the 4-H program has been an informal, voluntary and out-of-school educational endeavor. (C.A. App. 235 "B").

During the 1980 program year more than 95,000 young people and 15,000 adults took part in 4-H. It is the policy of NCAES that 4-H programs be operated without regard to race. (C.A. App. 236 "Y", 1013-16, 1074-77, 1092-93, 1095-98).

The local 4-H unit—be it a community club, or special interest group—is largely autonomous and completely voluntary. A volunteer adult is the leader. NCAES staff stress that all 4-H clubs and functions are open without regard to race. (C.A. App. 237, 844, 939-44, 1092-98, T. 4249, 5108-10).

The 4-H program is publicly supported by county, state and federal governments. For every $1 of public expenditure, there is a contribution of private money or services, amounting to $5-$6. The value of 4-H volunteers time exceeds $10 million. (C.A. App. 238 "Y", "B").

Within the county 4-H program there are 3 grass roots level organizations, community clubs, project clubs and special interest groups. None exclude participants on the basis of race. Within North Carolina there are community clubs which have members of one race and community clubs which have members of all races. NCAES does not participate directly in the administration of community clubs. However, NCAES 4-H agents assist in the organization efforts, Announcements are made that clubs will be organized without regard to race. 4-H agents encourage community clubs to form with both races when that club is in a racially mixed community. (C.A. App. 238 "B", 954-58, 1094-98, T. 4430-33).

4-H Special Interest groups are formed to provide short term instruction on a particular subject and were pioneered in North Carolina. These volunteer operated groups were designed to include large numbers of youth without regard to race. (C.A. App. 239 "Y"). More youth participate in special interest clubs in North Carolina than in the community based 4-H clubs. (C.A. App. 239, 583-85, 868-70, 945, 1018-21, 1077). The petitioners attack is on the community 4-H clubs.

The 4-H program in each county is dependent on volunteer adult leaders. Leaders are encouraged to form clubs on an integrated basis. (C.A. App. 239 "B"). Above the community club level every phase of 4-H within each county is fully integrated. (C.A. App. 240, 844-46, 853-54, 1022-23, 1120-22).

Although many states in the south closed their 4-H camps in 1964 and 1965, NCAES continued camp operations. In 1965, NCAES began scheduling counties and clubs within counties to deliberately achieve an integrated mixture. By 1972, complete integration within NCAES' 4-H camps was achieved. (C.A. App. 240-41, 847-52, 948-54, 1013, 1024).

The population of North Carolina is approximately 22% percent black. 4-H membership has remained 32% percent or more black since 1972. Since 1972, volunteer leadership has nearly doubled with the percentage of black leaders 27% percent or greater. (C.A. App. 241, 1099, 1106, 111-12, 1123-27, 1142-55, 2249, 2250-5, 2252).

Despite the policy of NCAES that 4-H community clubs be organized without regard to race, clubs do exist with members of only one race. Recognizing the benefits 4-H provides without regard to race, NCAES decided to continue to provide support to 4-H clubs which had members of only one race rather than to deprive children from obtaining valuable experiences. These clubs have not denied anyone membership on the basis of race. (C.A. App. 241, 961-64, 1025-34, 1156-61).

No one came forward at trial and testified of any discrimination or inferior services in connection with the 4-H program, except one instance in which the offending volunteer adult was immediately removed. (Pet. App. 167a).

The Community Resource Development Program

The Community resource development is another major program of NCAES. Extension's community development programs give emphasis to group action through citizen

groups and organizations. These organizations conduct programs built around community problems and needs. (A. 47, 242 "B", DX-65). The district court found there was no racial discrimination in CRD programs. (C.A. App. 56, 88, 93).

NCAES Employment Practices

1. Recruitment-County Level Positions

The District Court found that NCAES' recruiting practices were designed to obtain the highest qualified applicants. This finding was not appealed. (C.A. App. 246-348).

2. Hiring—County Level Professional Positions

The differing agricultural, social and economic needs of North Carolina's one hundred counties require a great variety of educational background and areas of specialty. Each county is not staffed at the same level of county agent personnel and the minimum staff numbers 2 to staffs exceeding 10 in number. (C.A. App. 244, 599-608, DX 67-1-100). Since November 1972, NCAES has sent monthly vacancy announcements to educational institutions, and the extension office in each county. (C.A. App. 245-46 "B").

The needs and size of the particular county and its programs dictate the qualifications of agent applicants. The agent determines whether to apply. The work required in one position is not the same as required in another position. NCAES employees are hired to fill vacant positions for which they are qualified and can not be "assigned" from county to county. Applicants who lack the skills and background required in a county position vacancy are not considered. (C.A. App. 224, 250, 738-39, 748, 750, 1332-33).

The district court found that subject matter requirements differed for each vacancy because of the needs of each county. The district court also found that county hiring procedures were non-discriminatory, that no evi-

dence was offered to show one qualified black who applied was not accepted and that no employee was ever discharged on account of race. (Pet. App. 62a).

The district court also found that there was no discrimination in connection with hiring blacks to work in any particular county or assignments to an area of responsibility. (Pet. App. 64a) None of these findings was challenged on appeal.

3. Hiring and Recruitment—State Level Positions

State level professional positions comprised, as of November, 1981, some 200 positions or .30% of the professionals employed within NCAES. These positions are specialists, program leaders, district chairman, assistant directors and directors. (C.A. App. 2233). No discrimination was found in connection with state level positions and the district court found state level hiring procedures to be valid and to comply with all employment discrimination laws. (Pet. App. 106a) These findings were not appealed.

The Performance Evaluation System

The NCAES performance evaluation system was found by the district court to be valid and non-discriminatory. (Pet. App. 154a-158a). The petitioners have not challenged the district court's findings. The NCAES performance evaluation system is the means for evaluating county level professional employees' job performance as part of determining their eligibility for title promotion, merit salary increases and selection to the position of county extension chairman.

The *Performance Review Guide* is utilized in connection with the annual cycle of performance review, analysis and planning within NCAES. (C.A. App. 260-261 "B"). The district court specifically approved the evaluation process utilizing the *Performance Review Guide*, and found it valid and non-discriminatory. (Pet. App. 154a-158a).

The *Performance Review Guide* becomes the final evaluation and is retained by the district extension chairman for use in the agents title promotions and merit salary considerations. (C.A. App. 261-62 "B").

Promotions at the County Level Agent Positions

This segment of the NCAES employment practices is referred to as title promotions and involves the process of promotion of agents from assistant to associate to full agent. It does not include county extension chairman. The district court approved the title promotion process utilizing the performance evaluation system as valid and non-discriminatory. These findings were not appealed. (Pet. App. 73a-74a).

County Extension Chairmanship Selection Process

The position of County Extension Chairman ("CEC") is important within the Extension Service and is the top county administrative position. The CEC is responsible for carrying out an effective county extension program. He or she carries particular subject matter responsibilities depending on the needs of the county staff. The CEC reports to the County Commissioners on programs, budgeting and personnel which require county participation. (C.A. App. 220 "B", 275 "B").

From 1972, to May, 1981 there were 77 CEC vacancies. All were announced statewide by publication. The announcement listed the county and subject areas of responsibility the CEC must carry. (C.A. App. 275, 276, "B", 278, "B", 60). The district court found that "the claims of the plaintiffs based on alleged racial discrimination by the Extension service in the selection of county chairman must fail." (Pet. App. 101a).

The CEC is not in a promotional line with that of extension agent. The CEC of a particular county is a position which must be specifically applied for when a vacancy occurs. (C.A. App. 275, 779, 1334-40). The needs of the county dictate the skills required for each CEC.

An individual is eligible for consideration as a CEC upon completion of six years (formerly seven years) of service or equivalent experience. At least two years must have been with NCAES. A Master's degree is desirable. The position demands serious consideration in selection of a qualified candidate because of administrative and leadership requirements. The District Extension Chairman meets with the County Commissioners to discuss the particular subject matter competencies required by the county. Then the District Chairman and state administrative staff prepare the statewide vacancy announcement. (C.A. App. 275, 276 "B", 780, 1334-40, 1760-62).

Applicants must apply in writing and possess minimum qualifications to be considered and interviewed. Important factors are subject matter expertise required in the county, demonstrated leadership, demonstrated administrative and management capabilities, educational background, and human relations and communications skills. When an applicant is an agent within NCAES, his or her performance in managing extension programs is well known due to the performance evaluation system. (C.A. App. 276-77, 781-789, 1000, 1334-40).

The applicant is interviewed by the District Extension Chairman, the Assistant Director for County Operations, the Associate Director and Director of NCAES. Then the group comes to a consensus as to who they will recommend to the County where the vacancy occurs. (C.A. App. 277, 789-91, 1334-40).

In some instances, more than one applicant will be presented for interview and selection. In some instances one candidate will be presented. As the County Commissioners have a definite right of approval, they may dictate how they want the applicants presented. In all instances, the Board of County Commissioners have the final say as to whether to accept an applicant. (C.A. App. 277-78, 790, 98, 1334-40, T. 3362-63, 5962-65).

At trial petitioners pursued the claims of alleged racial discrimination in the CEC selection process on two fronts.

One was statistical and the other was by utilization of the testimony of individual blacks and plaintiffs who claimed that they had been discriminated against in the selection process or that they believed it "futile" to apply.

The district court had before it not only statistical evidence, but the evidence relating to some 23 blacks who claimed discrimination in the CEC selection. (Pet. App. 93a-101a, 227a-301a) Those 23 individuals, however, comprised all blacks who applied for CEC positions or claimed to be futility claimants for CEC from 1968-1981. (C.A. App. 1736-1742, 60-69, 115-161). In each instance, the district court found no discrimination with respect to these individuals' CEC selections. (Pet. App. 227a-321a). The district court found no pattern or practice of discrimination in CEC selection and determined that the post Act selection procedures were fairly and uniformally followed without bias or prejudice. (Pet. App. 101a)

The Salary Process

The salary process for NCAES county level professional positions is affected by a multitude of factors which interact with each individual agent's employment situation on the county level and clearly shows that agents are not similarly situated in terms of their jobs regardless of race. (C.A. App. 280, 628-30, A. 755, T. 1008, 3483).

The organization establishes a minimum entry level salary for all new employees at the Assistant Agent level with a bachelor's degree and no prior experience. A salary differential is offered to those holding a master's degree at the time of employment. (C.A. App. 280 "B"). On occasions, due to "market demand", the NCAES has paid more than minimum entry level in order to employ individuals in particular subject matter fields where skills were in short supply. There have been occasions when a new employee with prior relevant experience justified a salary higher than entry level. (C.A. App. 280, 2210, 2181-89, 1322-23).

In recent years, due to inflation, starting salaries have increased dramatically. In order to compete this has required NCAES to continually adjust its entry level salary. Because of this, new agents have been employed at salary levels close to agents with two years of tenure. To avoid negative impact on staff morale, NCAES adjusted salaries on a number of employees to bring them up to new minimum levels following each increase in entry level. In 1981 NCAES was forced to utilize $70,000 of its merit salary money to make these adjustments. (C.A. App. 280, 629-30, 643, 823, 990, 1008, 1389).

After initial employment, the individual agent or County Chairman's salary is affected at any given time by a great number of factors such as tenure, additional degrees obtained, area of specialization, area of responsibility, job performance, scope and complexity of the program, ability of the county to pay, state and county across the board raises, state and county merit raises, competition in the marketplace for holders of certain educational background and skills, and competition between counties for a particular agent's talents, none of which have anything to do with race. (C.A. App. 281, 492, 547-48, 608-11, 631-34, 775-57, 992-93, 2210, 2181-89, T. 3483-87).

The financial ability of counties to support the local Extension program and the salaries of its agents varies considerably throughout the state. (C.A. App. 281 "B").

Most years, the General Assembly provides some type of across the board percentage pay increase or a flat sum. These raises are non-discriminatory and every NCAES employee gets them in the state/federal percentage of their salary. The amount will vary depending upon the percentage of state contribution to their salary in the county. (C.A. App. 281, 494, 644-50, T. 1182).

From time to time a county may grant across the board pay increases. Some counties may not grant such

increases at the same time. Such increases are non-discretionary and are administered in a non-discriminatory manner. The granting or failing to grant a salary increase in some counties and not in others causes variation in agents' salaries between counties. (C.A. App. 281-82, 639-44, 987-90).

Each year, approximately 10% of the counties make available to NCAES funds to provide merit salary increases based upon performance evaluation. This results in variation in salaries between agents in different counties. (C.A. App. 281-82, 535-37, 639-44, 760-61, 765-66, 770-73, 801-2, 819-23, 987-90).

Some years the General Assembly appropriates funds to provide state employees with "merit" salary increases. (C.A. App. 282 "B"). Merit salary increases do not occur on an annual basis. The major factor is job performance following the agent's last merit salary increase. (C.A. App. 282-3, 614-16, 760-761, 765-766, 770-773, 801-802, 819-823, 1322-23, 1382-83, DX 92, 92a, 93).

The valid job performance evaluation system forms the basis for determination of an agent's eligibility for a merit salary increase through the use of the quartiling process. Quartiling is *only* utilized in the allocation of state merit funds. (C.A. App. 283, 1382-1383).

The District Extension Chairman, based upon the agent's performance places each agent within one of four quartile groups. Because each agent's particular plan of work and job requirements differ from agent to agent and county to county, agents do not compete against other agents' performance to achieve a quartile ranking. Agents compete against themselves as their performance is measured on an individual basis. Once an agent is placed in a quartile, the agent is not ranked within the quartile. The four quartile groups rank all agents within the district regardless of their areas of responsibility, degree or tenure. (C.A. App. 283, 284-5, 612-23, 814-18, 1055-57, 1376-79, 1374-1383).

An agent whose performance has improved during the performance review period may move to a higher quartile. An agent whose performance has declined during the performance review period may drop to a lower quartile. (C.A. App. 284-5, 814-818, 1380-81, 1325-30).

An agent with two years of service can expect to be placed in the first quartile if he or she does an outstanding job, just as an agent with ten years service can expect to be placed in the first quartile for an outstanding job. The converse is also true. (C.A. App. 285, 814-18, 1374, 1382, 1386-1388).

Before the allocation of merit money can be made, the District Extension Chairman must first apply merit funds to agents' salaries to adjust for any increases by NCAES during the previous performance period in the entry level salary for positions of assistant, associate and full agents. (C.A. App. 286, 287 "B", 629-30, 823, 990, 1008, 1386-7).

An agent whose performance is fourth quartile usually will not receive a merit increase. However, the agent in the fourth quartile whose salary was below the entry level salary, will have received the "entry level" adjustment made prior to the merit salary allocation process. (C.A. App. 287 "B", 1386-7).

The dollar allocation to each agent within a quartile will basically be the same. (C.A. App. 228, 819-822, 1331-32, 1388).

The quartiling process highlights that NCAES agents are not performing the same jobs under the same conditions. From initial hire on, each agent competes against his or her own job performance goals for merit pay and his or her jobs is different in and of itself. This coupled with the variances between counties and different job responsibilities dictated by county needs makes each agent's job unique.

SUMMARY OF ARGUMENT

I. The court of appeals correctly decided the salary claims of petitioners in this disparate treatment case. The district court properly analyzed all claims by the allocation of proof set for disparate treatment cases, which claims require proof of intentional discrimination. The district court and court of appeals correctly followed *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973); *Teamsters v. United States*, 431 U.S. 234 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *United Airlines v. Evans*, 431 U.S. 533 (1977) in requiring petitioners to prove their assertions of intentional discrimination. In each instance, petitioners failed to do so. The existence of intentional discrimination is for the trial court to decide. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's two decisions clearly show this was carefully decided on the facts.

Petitioners tried this disparate treatment pattern or practice and individual claim case without regard to the particular facts surrounding NCAES, its special requirements for hiring, staffing and without regard to the real non-discriminatory factors which clearly affect salary differences between all agents irrespective of race. Petitioners come here asserting the same old arguments which have failed them in the past.

NCAES employees are professionals with college degrees required. Each of 100 counties has needs for different training and educational skills for NCAES agents. Salaries are not now, nor have they ever been, the same except for the minimum starting salary. From initial employment on, salaries of agents vary from county to county depending on performance, percentage of state versus county contribution and many other factors, none of which are racial. Petitioners submitted inaccurate comparisons and statistics which failed to utilize the proper factors affecting all agents salaries. NCAES refuted and rebutted such evidence and showed it to be

inaccurate and lacking in probative weight, which is permissible under standards set by this Court in *Dothard v. Rawlinson*, 433 U.S. 331 (1977) and *Teamsters*, supra. The district court and court of appeals properly rejected such evidence and improper statistics.

II. The district court and the court of appeals correctly rejected claims that the selection of county extension chairmen was discriminatory. Petitioners, utilizing inappropriate comparisons with respect to the selection process of the county extension chairman, the highest county level position in NCAES, failed to prove their case. The district court, applying the appropriate allocation of proof set out in *Teamsters* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), analyzed the statistical cases and individual claims against the evidence presented at trial. Petitioners failed to prove a discriminatory pattern or practice and each individual claim was found free from intentional discrimination. Petitioners assert the decision violates *Arizona Governing Board v. Norris*, 408 U.S. 1073 (1983). Once again, Petitioners avoid the facts.

NCAES and each of North Carolina's 100 counties are co-employers. NCAES recommends prospective employees to the County Commissioners. The decision must be one of joint acceptance. No responsibility is delegated to a third party. (Pet. App. 77a) *Norris* is not applicable to this case. The district court found no intentional discrimination on the part of NCAES or county commissioners thus the Title VII and Section 1981 claims were properly denied.

III. The district court and the fourth circuit correctly denied Petitioners claims that the NCAES 4-H and Homemaker Extension Club programs were operated in violation of Title VI and on a racially discriminatory basis. Out of thousands and thousands of voluntary black participants in the 4-H and Extension Home Economics programs since 1965 in North Carolina, not one came forward to testify that he or she had ever been subjected

to racial discrimination. The facts show no "freedom of choice" plan exists here. Both programs are voluntary and not mandatory public school attendance situations. NCAES affirmatively took action which eradicated pre-1965 segregation in 4-H and Extension Homemaker programs. Rather than withdraw support from one-race clubs which had not discriminated, NCAES elected to provide support without regard to race. The proof of the pudding is that out of the thousands of participants in those two programs none came forward to complain or assert any racial discrimination.

IV. The district court and the fourth circuit properly denied class certification in this case. The record clearly shows that class action was improper under Rule 23, Federal Rules of Civil Procedure because NCAES employees are not similarly situated and lack commonality in employment. Petitioners assert *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) was violated by both courts. *Eisen*, supra. dealt with two issues. The first was whether a class action determination was appealable under 28 U.S.C. § 1291 and the second was whether a district court, upon preliminary hearing on the merits, can require defendants to pay a part of the class notification costs. Neither issue is present in this case. The case was tried as a pattern or practice case in which the relief, had Petitioners won, would have been the same as if they had a proper class action, which they did not. Petitioners have pointed to no prejudice to their case by trying them as pattern or practice claims. The same relief is available either way. *General Telephone Company v. EEOC*, 446 U.S. 318 (1980). Even the elements of proving a prima facie case are the same in a pattern or practice case. *Cooper v. Federal Reserve Bank of Richmond*, 81 U.S. L.Ed.2d 718 (1984). The facts show that a class action is not appropriate here and the decisions do not conflict with decisions of this Court.

NCAES met the claims of petitioners and the United States head on in the trial of this case, responded to

each claim, and showed an organization free from racial discrimination. The decisions should be affirmed in all respects.

ARGUMENT

I. THE DENIAL OF THE SALARY CLAIMS WAS CORRECT AND SHOULD BE AFFIRMED

Petitioners claim error in the denial of salary claims. Before addressing petitioners salary arguments, we would like to recap the facts relating to NCAES and factors relating to salary affecting all county agents, regardless of race.

The organization of NCAES as described earlier in this brief is not contested. The existence of 100 separate counties as autonomous entities is not contested. That the financial contributions made by each 100 counties to its own extension program varies from county to county, is not contested. That the financial contribution from NCAES to the extension program of each individual county varies, is not contested. That the salaries paid to county level professionals varies from county to county is not contested. That when the State grants an across the board increase the amount received by county level agents varies according to the percentage of state/county contributions to the program, is not contested. That in any given year some counties may grant across the board raises to agents according to the percentage of that agent's salary paid by the county and other counties may not give any increase at all is not contested. That merit raises by the state affect salaries of individual agents based on their own performance is not contested. Only a small part of the overall funds is allocated to merit raises. That some counties may give merit salary increases in some years while others do not is not contested. That salaries paid to county extension chairmen vary widely between the county chairmen in 100 counties and that said salaries provide a maximum for county level staff in that county is not contested. In each of the 100 counties in North Carolina there exists a different level of salary due to the economic and agricultural pro-

grams of each county. Each of these separate factors creates salary differentials between agents and is not in any way attributable to an intentional statewide system of salary based upon race. (C.A. App. 212 "B", 213-14 "Y", 216 "Y", 220 "B", 221-222 "B", 223 "B", DX67-1-100, 275 "B", 281 "B", 282 "B", 286 "B", 287 "B".)

That each of the 100 counties has certain requirements which differ from other counties in connection with its extension program needs is not contested. Thus, a county whose chief agricultural commodities are livestock, poultry and truck farm crops will not require an agent whose educational training and background expertise is in tobacco or soybeans. A county whose major agricultural commodities are tobacco, soybeans and corn will not require an agent whose educational background and skills are in hog farming or cattle. It is uncontested that the needs of the individual counties dictate the needs and staff requirement of the extension program in each county and that those needs are different among the 100 counties. Thus, not every agent can be utilized in every county as their skills, experience and special qualifications vary with the county needs each meets. One cannot analyze the salary process of NCAES without understanding the uncontested factors that affect salaries of each agent. (C.A. App. 216 "Y", 221-222 "B", 224 "Y", 226 "Y", 275-278 "B", 280 "B", 281 "B") The petitioners do not dispute or seriously contest the facts which give rise to the differences between the needs of the counties, that such needs actually exist and that staffing is not uniform between counties because of the varying needs. The petitioners do not dispute or seriously contest the fact that these differences in county/state percentage of salary, merit raises, and other factors do in fact exist. They simply have elected to ignore them and proceed to analyze salary by utilizing an across the board average approach based on race, tenure, degree and title omitting the factors caused by the organization of NCAES and the differing needs and support between counties. The United States, in its brief, has acknowledged that county differences cause variances in salaries between counties. (U.S. Br., 30) The private petitioners continue to characterize them as "imaginary". The reason for this is that the facts show that any variances between agents, black or white, is not the result of any intentional racial discrimination.

A. NCAES agents, regardless of race, are not similarly situated nor performing the same jobs

The petitioners make inaccurate assertions that the lower court decisions permit NCAES to pay blacks less than whites in the same job and that the jobs of blacks and whites within the county level professional positions are the same or similarly situated.

Taking off from the inaccurate "less pay for same jobs" launching pad, petitioners equate the facts in this case with those of shift workers located in the same facility being paid different hourly rates based on sex in violation of the Equal Pay Act of 1963. After arguing that a violation of the Equal Pay Act is also a violation of Title VII and that the same principles should be applied to blacks being paid less than whites for the same jobs, the petitioners argue (1) that whites are paid more than blacks by virtue of a pre-Act and a post-Act discriminatory salary process, (2) that the NCAES has continued to engage in intentional salary discrimination in violation of Title VII and Section 1983, and (3) that their statistical evidence proved intentional discrimination, but was improperly rejected by the district court and court of appeals.

The NCAES employment system is unique, not uniform and because of real differences between positions, its professional level employees do not perform the same jobs nor are they similarly situated, be they black or white. As petitioners' contrary assertions are not correct, and NCAES contends the record proves they are not, their entire case must crumble and fail.

The fact that NCAES county level professionals are not doing the same jobs nor are they similarly situated in

terms of employment is shown by looking at the county by county differences and different factors affecting each agent's salary. These factors have been discussed in the Statement of Facts and at the beginning of this argument. (See pages 17-21 *infra*) Because of these differences each county program is unique and NCAES county level professionals work within each program at separate tasks dictated by the need of that particular county and do not do the same jobs or have the name responsibilities to be characterized as similar.

With respect to salaries, external non-discriminatory factors such as percentage increase in salary, degree, tenure, county percentage of pay, across the board increase, and merit proves that each professional, black or white, is not doing the same job nor are they similarly situated.

The quartile system is a clear reflection of the fact that each agent not only competes against himself or herself, but that the reason for this is that each agent's job requirements and work is different than others. If each agent were doing the "same job" or were "similarly situated" in terms of employment, the performance of each agent in a particular subject matter area, level or program would be measured against the other agents in that area, level or program. (Pet. App. 113a, n.31)

If the assertions made by petitioners that county employees have similar jobs and do the same jobs such that they fit nicely into the Equal Pay Act arguments and theories put forward to this Court, why are the highest ranking administrative jobs in the 100 county offices different in terms of salary? The record is undisputed that the pay of CECs vary from county to county from year to year by thousands of dollars. (J.A. 165-167) The answer is simple. CEC's do not do the same jobs either. The CEC's salary is also a "cap" on the salaries of agents on each staff, regardless of tenure, degrees, performance and areas of specialty. (DX-67-1-67-100)

The record clearly shows that just because an agent bears the title agricultural extension agent or 4-H agent,

his or her job is not the same nor are his or her employment conditions similar to an agent bearing the same title located within another county. Each works to fulfill the goals of his or her own plan of work dictated by the program needs of the county in which the agent is employed. (Pet. App. 114a) The district court acknowledged these facts in denying an employee class. (J.A. 78)

The U.S. now acknowledges that it is undisputed that salary levels vary from county to county and that such a factor should have been included as a variable in considering salary claims. (U.S.Br.30) Petitioners' premise that blacks receive less pay than whites for doing the same job in similarly situated settings must be disregarded.

B. The District Court and Court of Appeals correctly applied Teamsters, Hazelwood and Evans to the salary claims

Petitioners argue that the district court and court of appeals erroneously applied *Teamsters Hazelwood*, and *Evans* in connection with the pre-1965 salary differences between black and white NCAES county employees. Petitioners claim that the differences in salaries were the result of intentional salary discrimination and even if NCAES acted in a completely non-discriminatory manner in its salary process from 1965 forward any difference in salaries resulting from before the effective date of the Act in 1965 constituted a continuing violation of Title VII.

The court of appeals disagreed that this was the law. "A public employer who from this date forward (date of the Act) made all its employment decisions in a wholly non-discriminatory way did not violate Title VII even if it had maintained an all white work force by purposefully excluding Negroes." *Hazelwood School District v. United States*, 433 U.S. 99 (1977). This language in *Hazelwood* was relied upon by both courts in reaching their decision. The court of appeals held that any so-called "lingering effects" of pre-1965 salary differences was not actionable. (Pet. App. 389a)

While there can be no denial that prior to 1965, the NCAES was divided into a white and black branch, the record does not reveal that NCAES set any "wage scales" for blacks or whites. The jobs of the blacks, as were jobs of whites, were not similar before 1965 or after 1965 for the reasons previously stated and set out in the Statement of Facts.

The reason petitioners must make their intentional "wage scale" argument with respect to the pre-1965 situation is that this is a disparate treatment case and intent is required. A disparity in salary alone does not meet the burden of proof under Title VII disparate treatment. (U.S. Br., 20, n.18)

Thus, petitioners argue that any wage differences existing before 1965 were a result of intentional discrimination and that

> "black employees hired before 1965, because of their race, have received and continue to receive lower salaries than white employees who have been performing the same job for the same length of time." (U.S.Br.14)

C. The evidence does not reveal any Pre-Act intentionally set wage scales existed in NCAES

Petitioners argue that because Bazemore's base wages were established prior to 1965, NCAES could "indefinitely" to pay him and others like him lower salaries than wages paid to whites. (Pet. Br. 7) Bazemore's salary as an agent in 1971 was $13,342. Bazemore was making more money than the CECs in 47 counties in 1971. (DX-67-51, J.A. 165-167)

The district court found that the salaries of black agents in the pre-65 segregated system were lower than the salaries of white agents. The district court found that prior to the 1965 merger, the Negro Branch was headed by the "Negro state agent", R.E. Jones, a black male who was responsible for the budget and state plan of work of the Negro branch, including the hiring, promotion, discipline, discharge and *salary determination* of all black personnel. (Pet. App. 28a-29a) Neither petitioner called Jones as a witness, electing instead to introduce his deposition and an excerpt thereof. (GX-144.2) Jones testified that salary and salary increases recommend by him were almost automatically concurred in by NCAES. Jones did the hiring and set the starting salaries. Jones did not claim that his branch was discriminated against in budget allocations nor did Jones testify that separate wage scales were established or forced upon him for black agents in the pre-65 system. (GX-144.2)

Whatever salaries were established for agents hired by R.E. ones, the black administrator, they cannot be said to have been deliberately set on the basis of race by R.E. Jones and the record is devoid of any evidence to that effect. It flies in the face of reason that whatever Jones' decided in terms of salary or increases was set with deliberate intent to discriminate.

Another piece of evidence which petitioners contend show that average salaries differed because of intentional discrimination by NCAES is the Blalock Memorandum of 1971, GX-157. (J.A. 129) Petitioners' assertions on that point were not supported by findings of the district court. The reason for this is that Blalock was grappling with the average difference problem and not trying to maintain average differences at all. His memorandum refers to factors which explained average differences in salaries which were real, such as the competitive market. (J.A. 91)

Blalock testified about GX-157:

> ". . . I am simply stating that this is a reflection of what existed not only in North Carolina but throughout the country. At that point in time, there was a difference . . . not because of intentional discrimination on anybody's part but reflecting the fact that home economics agents could be hired at lower salary that white agents could . . . and I might add and I think it is a reflection of the fact that black agricul-

tural agents could be hired and retained at a lower salary than white agricultural agents." (C.A.App. 995-999)

This explanation clearly shows that any resulting differences between blacks and whites, agricultural agents and home economics agents, were not the result of intentional racial discrimination. Blalock was trying to solve the disparity situation within the financial resources and the unique salary structure of NCAES.

> "That was a figure that I concluded that we ought to do to make adjustments in salaries that we needed to make at that time in response to the changing salary structures of our entry level salaries and in response to what we knew we were going to have to do as a result of the EEO Act." (C.A.App.900)

The record shows that NCAES did attempt to make adjustments within its budgetary parameters and visited each county separately to explain the situation and ask for support in the endeavor. (C.A. App. 900-903) Such efforts were made to reduce the average differences but due to the county by county salary differences and finding structure 1971, the averages were not eliminated. (Pet. App. 389a-90a) There is no evidence to support petitioners' claim that "the practice of fixing salaries or raises on the basis of race did not end in 1965" (Pet. Br. 8, 9).

Neither court below made a finding that the differences were based on intentionally set wage scales. The district court found that prior to the merger in 1965 the salaries of "professionals in the black branch on the average were less than those of their counterparts in the white branch". The Court also found that the disparity was recognized and steps taken to begin its elimination. (C.A. App. 120a-121a)

The district court made a *separate finding* with respect to the petitioners' claims that NCAES has failed to correct past effects of past discrimination. No appeal was taken from this finding. The district court stated:

> "The allegation is that defendants have failed and refused 'to take appropriate action to correct the present effects of ast racially discriminatory policies and practices.' Here again the allegation involves the assumption that there has been discrimination in the past the effects of which continue, a thesis staunchly denied by defendants . . . A violation by the defendant of any duty, statutory or otherwise, 'to take appropriate action to correct the present effects of past racially discriminatory policies and practices' has not been established." (Pet. App. 158a-163a)

The court of appeals acknowledged that salary disparities which had existed between the two branches were not immediately eliminated, but that by 1972 when Title VII became applicable to NCAES, that NCAES had "already been operating on a nondiscriminatory basis for about 6 years" and that since the merger in 1965, the NCAES had set a minimum starting salary for all new county level agents. (Pet. App. 360a) The court of appeals recognized that the disparities were reflected from the pre 1965 discriminatory structure of NCAES but did not find such salary disparities resulted from intentionally set wage scales. (Pet. App. 359a, 384a, 389a)

NCAES contends the differences in salaries then, as now, are due to the factors shown by the evidence to actually affect salaries between agents, not race.

It is undisputed that since 1965 there has been a uniform minimum starting salary for entrance level positions. (Pet. App. 384a). Thus the focus for petitioners' claims is on pre 65 black agents who were "doomed" forever to being paid less than whites doing the same job. (Pet. Br. 24)

An examination of the pay data for agricultural extension agents who were employed as of the effective date of the Act in 1965 and on July 1, 1972 reveals that there were 42 black agricultural agents and 65 white agricultural agents in that category. Taking petitioners asser-

tions to their conclusion, the pre 1965 blacks should have been making less than any pre-65 white agents. Certainly no pre 65 white agents should have been making less because of the "wage scale" differences.

Appendix Exhibit A attached to this Brief is striking in contrast. Appendix Exhibit A is submitted with the admission that comparisons are meaningless without knowing each individual's job requirements and other factors affecting salary. It is presented to show only that what petitioners claim was occurring pre Act and post Act in salaries of pre 65 black agents did not occur.

D. The Evidence shows the salary process to be non-discriminatory

Private petitioners assert the factors affecting the salary process recognized by the courts, but omitted in their statistical cases, are imaginary. The evidence shows otherwise.

It is not disputed that the financial ability of each of North Carolina's 100 counties to support the local extension program and salaries of agents varies considerably between lower income counties and higher income counties and the percentage of salary support varies with each county. (C.A. App. 281 "B").

After an agent is employed in his or her county position, the salary of that person is affected by a number of factors each year and are not imaginary. (C.A. App. 281, 639).

Counties provide across the board increases in salary ranging from 2 to 12%. Not every county provides an across the board increase each year and many give no increase at all for several years. An agent who receives 5,000 in county portion of salary and gets no county increase would stay at 5,000.00. But an employee in another county who also got 5,000 from the county and got an across the board of 10% would get 500.00 ahead in one year on county salary. (C.A. App. 639-640).

Conversely, in an across the board state increase the state portion of an agent's salary is also subject to the *same factors* as the county portion. (C.A. App. 223 "B"). That percentage of increase affects *only* the state/federal portion of the county professional's salary is automatic and non-discriminatory. (C.A. App. 647).

In a county where the state/federal contribution is 60% and the county is 40%, the effect will be different from a county in which the percentage is 44.7%/55.3%. (A. 2184).

NCAES does not take state salary money from those counties who are supporting the extension program to fund county raises in those counties who do not support the program. This factor causes a variance as well. (C.A. App. 648).

In addition to the variances which are created in county level professional personnel by virtue of the county/state percentage of funding, across the board or merit, the evidence shows other factors which affect the salary of each county agent.

Tenure is a factor which is undisputed as affecting salary. (C.A. App. 626, 281). Educational level position and degrees are factors. (C.A. App. 626, 281). The area of responsibility and size of the program of an agent are factors. (C.A. App. 626, 281). Another factor is the particular area of skill required by the particular county. In some instances it is necessary to pay more to get particular skill which is needed. (C.A. App. 628, 629). Another factor which affects salaries is inflation. Inflation causes starting salaries to rise almost to the level of salaries paid to agents with 2 or 3 years tenure. Adjustments must be made to bring senior agents up to now agents salaries. (C.A. App. 629-30).

Job performance is also a factor which undisputedly affects merit pay raises of objects as seen by the quartling process. (C.A. App. 814-818, 1374-1375).

Quartiles are used because that agents' individual jobs are not comparable with other agents and an agent competes against his or her own performance goals. (Pet. App. 113a).

It is impossible to measure the performance of an HEA working to solve nutrition problems in Bertie County with the performance of an HEA working in clothing in Mecklenburg. Each HEA's responsibilities are different in that each is teaching in a different educational environment with different educational goals. If all HEA's screwed caps on bottles there would be a basis for comparison of agent to agent, but not so here.

Another factor ignored by petitioners is that the practical maximum salaries the county extension professionals can receive are affected in *each county* by the salary paid to the CEC. The salary paid the CEC sets the maximum for agents regardless of title, tenure, degree, performance, responsibility or program. (DX 67-1-67-100, 196, C.A. App. 632, 2210). The evidence shows that factors, in great measure, are completely *non-discretionary*, over which NCAES has no control the courts found were not abused and distorted. Both the district court and court of appeals recognized this fact. (Pet. App. 112a-113a, 383a).

E. Petitioners' statistical cases were properly rejected

At trial, the petitioners anchored their salary discrimination claims almost entirely on the statistics not related to these known factors. The petitioners' cases boil to the utilization of three "factors" of salary comparisons between blacks and whites with NCAES. These are race, tensure and degree. They utilized averages of salaries between blacks and whites, "comparisons" and multiple regression analysis in an attempt to prove discrimination in salary on the basis of race.

In view of the proven factors, which have an effect on salaries of NCAES county level employees, the lack of inclusion of those factors into the salary exhibits promulgated at trial by the plaintiffs showing "comparisons" of salaries failed to impress the Court. The district court held that the numbers just did not measure up to showing, explaining or proving plaintiffs' case. (Pet. App. 143a). The court of appeals likewise refused to be taken in. (C.A. App. 387a-388a).

The parties utilized two expert statisticians in connection with multiple regression analyses of salaries. Dr. Mann (Pls and US) and Dr. Gieshbecht (NCAES). The district court found the regression insufficient because they omitted major factors which clearly affected salary. (Pet. App. 132a-146a, 388a). In connection with a discussion of invalidity of the regression analysis, the district court referred to the case of *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981); 695 F.2d 134 (5th Cir. 1982), affirming findings of no discrimination previously affirmed. *Wilkins* is parallel to *Bazemore* with regard to statistics and the affect of the various factors which relate to salary, hiring and promotions: Chief Judge Gee stated:

> "Because of the significant role that statistics play in discrimination case and of their inherently slippery nature, it is imperative that they be used properly." 654 F.2d 395.

Here, the omission of valid factors proven to have an effect on salary prevented the regression from being an adequate tool.

Neither Dr. Mann nor Dr. Giesbrecht were qualified subject matter experts. Both declined to testify that they were qualified to know what subject matter variables such as job performance, county salary percentage, subject matter areas or size of subject matter responsibility should be, or not be, included in the models and the effect of such inclusion or omission except to say it would have an effect. (C.A. App. 412, 474, 475, 1523, 1524, 1530).

Neither statistician utilized in their models the factors reflecting size of county salary, size of state salary, merit increases, across the board increase, area of responsibility,

the size of the programs, job performance, skills, market demand, or prior experience. Both agreed that if a variable could explain salary more precisely, then they would want to see its affect on the model. (C.A. App. 450-456, 1463-1465).

The petitioners' regressions failed to separate the responsibilities of the CEC and the CEC's highest pay. (C.A. App. 446). The regressions in which county chairmen were omitted showed a reduction in the so-called race coefficient. (DX-277). The district court found the failure to exclude the CEC from the models was improper. (Pet. App. 139a).

The failure of the regressions to prove much of anything is further proved by the fact that the petitioners' regressions, using only race, degree and tenure as variables, accounted for only 53% of the total salary variation that existed among agents and chairmen on that date. 47% of the variation is not explained. (C.A. App. 396, 1464-1468, 2332, 1691-1716, Tr. 6056, 6065, 6082).

NCAES offered a series of scattergrams showing the relationship of salary to tenure between black and white agents for the years covered by the regressions. (C.A. App. 2326-2332). When plotted out in graph form, the salaries are displayed in a completely random distribution. Dr. Giesbrecht testified the distribution was random and that meant he saw "no pattern". (C.A. App. 1153-54).

In *Wilkins*, Judge Gee stated:

> "The fundamental flaw in plaintiffs' statistical evidence is that it fails to take into account the fact that a number of factors operate simultaneously to influence the amount of salary a faculty member receives." 654 F.2d 402.

The district court found the same fatal flaws in petitioners' cases. (Pet. App. 148a-150a).

The burden of establishing valid statistics was never met by petitioners and was thus unacceptable to both the

district court and the court of appeals. (Pet. App. 387a-391a).

F. The Petitioners failure to include known factors affecting salaries was deliberate and not the result of surprise

Although the U.S. now acknowledges in its brief that it is undisputed "in this case that salary level varied among the various counties" and that the court of appeals was correct that such a major variable affecting salary should have been accounted for in petitioners' case, the U.S. asserts that petitioners should be excused from having omitted it from the regression analyses because petitioners did not have any knowledge of its existence, along with other variables, until the "brink of trial" when those variables were purportedly first identified by NCAES. The U.S. now acknowledges that the salary of agents is affected by a "complex matrix" of salary decisions, including merit raises, cost of living increases and county to county variations in salary increases. (U.S. Br. 21, n.19, 30, n.30).

Petitioners knew of the complex matrix and myriad of factors and differences affecting individual employment in NCAES as early as 1975 and simply elected to disregard them in favor of an across the board average approach to this case which compared black average against white average and utilized regressions which used race, tenure and title. Petitioners left out performance, a major factor because they were challenging the quartile rankings for determining merit (performance) pay. (U.S. Br. 34, n.34).

The differences between counties and agents jobs were apparent to anyone who read the pre-1974 discovery. NCAES's Memorandum in opposition to *both* petitioners' motion for class certification filed January 23, 1975, stated:

> "As each county varies in size, population, needs and requirements, wealth and resources, the salaries

of agents vary in size from county to county, together with the volume and extensiveness of services provided by county extension staffs. . . .

. . . A review of salary differentials between agents and home economics agents of equal tenure vary from county to county. The specific factors peculiar to each county's needs and requirements play a role in such differentials . . ." (Def. Br. 1/23/75 p. 7-8)

This was written six (6) years before trial. The district court recognized these facts and denied class action because agents were not linked by similar job conditions or commonality. (J.A. 74-79). In 1981, petitioners took depositions again of NCAES' director and associate director. Following those, petitioners renewed the motion for class certification asserting across the board racial discrimination. Citing specific deposition testimony given in 1981, NCAES pointed out the factors affecting agent's individual employment and the lack of similarity in jobs and salaries.

"Although salaries of assistant, associate and full agents and the county chairmen have minimums established which NCAES and each county must meet, salaries from county agent position to county agent position vary with each county above the minimum level . . .

Salary levels for the same position as associate agent or for that matter, county chairman, differ from county to county. In fact there are some counties where agents make more than county chairmen in other counties. (Def. Mem. 7/27/81.8-9, J.A. 37)

NCAES listed 15 factors affecting salaries of agents, excluding across the board NCAES raises. After listing them, NCAES's stated that assertions by petitioners that they were discriminated against in salary without providing details including variables affecting salary would be insufficient to prove their assertions. (Memo. 9, 15).

It is evident that petitioners were aware of the differences between agents in work and salaries well prior

to trial and that petitioners had to knowingly and deliberately disregard them as they prepared their case in favor of meaningless averages and unreliable regressions which failed to explain or prove much of anything. (Pet. App. 379).

Neither the district court or court of appeals, who carefully took the time to review the evidence, were misled. Both courts refused to accept the comparisons and regressions as proving discrimination because they did not reflect the facts and found it "defied logic" to make comparisons of salaries between counties. (Pet. App. 387a-388a).

With the petitioners spurious across-the-board "wage scale", "surprse" and "imagination" arguments exposed, the correctness of the salary claims decisions is clear and the decisions should be affirmed as correct.

II. THE COUNTY CHAIRMAN SELECTION CLAIMS WERE PROPERLY REJECTED

The district court held that the "Claims of plaintiffs based on alleged racial discrimination by the Extension Service in the selection of county chairmen must fail." (Pet. App. 101a). This holding was affirmed unanimously by the circuit court. (Pet. App. 423a, 425a).

Petitioners contend that neither the district court nor the court of appeals gave proper weight or analysis to their statistical cases and inaccurately argue that the decision of the court of appeals is in conflict with *Arizona Governing Board v. Norris*, 403 U.S. 1073 (1983).

Petitioners have caused the CEC claims to be distorted because they now argue that discrimination had been proved and but for faulty analyses by both courts below, they would have won on this issue. (Pet. Br. 70-71).

Petitioners utilized two methods in attempting to prove their claims of racial discrimination in selection of County Extension Chairmen (CEC). The first was by the use of raw statistical data showing the numbers of whites versus

blacks from 1962/63 through 1981 and various comparisons stemming from that raw data. (J.A. 114-127). The second method was to challenge the individual CEC selections in which blacks applied but were not selected from 1970 to 1981 with a sprinkling of so-called "futility applicants" thrown in for added effect.

The district court, after hearing the evidence, found that in each instance where blacks applied but were not selected, there was no racial discrimination shown and that the NCAES had offered legitimate non-discriminatory reasons for each decision contested. As far as the so-called "futility applicants", the district court reviewed their reasons for not applying for vacant positions and found them not to be credible. (Pet. App. 94a, 95a, 100a, 101a, 227a-317a). Petitioners attempt to sweep these factual determinations under the rug. Findings based upon the evidence cannot be disregarded. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's decision on individual claims shows why petitioners have chosen to reveal only the statistical side of their CEC claims.

Petitioners complaints about the failure of their statistical case are without merit. Petitioners disregarded the fact that the position of CEC is a position requiring special qualifications and numerical comparisons including race and tenure standing alone are meaningless.

The record is quite clear that the CEC position requires special qualifications, including leadership. (C.A. App. 275 "B"). The requirements for the CEC vary because the needs of the individual county vary. (C.A. App. 213 "Y") It is undisputed that each CEC must carry particular subject matter expertise, depending on the county where the CEC position is open. (C.A. App. 220 "B"). Thus not every agent with sufficient time, title and subject matter expertise is qualified to apply for any CEC position that becomes vacant. An agent with expertise in dairying is not going to fit where the need is for specialty in tobacco. Petitioners simply ignored the facts in preparation and presentation of their statistical cases.

The "statistical" evidence presented clearly shows that all petitioners did was to compare black agents with white agents, by sheer numbers or by tenure and degree. They failed to show the special qualifications needed for the positions. Where special qualification are needed to fill particular jobs, such general comparisons lack probative value. *Hazelwood*, *supra* and *Teamsters*, *supra*.

Peteitioners also disregarded that the CEC position is one which, in addition to requiring particular skills to fit the county's needs, carries administrative and supervisory responsibilities. It is undisputed that the CEC is responsible for making hiring, salary, promotion, evaluation and staffing recommendations but is also responsible for carrying out an effective extension program. (C.A. App. 220 "B").

The district court recognized the position of CEC for what it is and correctly rejected the petitioners broad brush approach.

> "Plaintiffs' statistics are flawed in a further respect in that they include the assumption that every black full agent at the county level was qualified to fill the position of county chairman. There was an utter lack of proof to substantiate such a claim, and the persistent efforts of defendants through discovery and all the way through trial to require the plaintiffs to identify the qualified labor pool from which this position should be filled met with no success." (Pet. App. 89a-91a)

The district court also found the position required special qualifications and that the officials participating in the NCAES selection process were fairminded and acted without racial bias or prejudice. (Pet. App. 89-91a).

The district court properly extended the pre Act (1962/63) numbers game.

"Thus, in order to be valid, a statistical analysis such as the one presented here must exclude those persons hired prior to [March 24, 1972, the effective date of Title VII for public employers]. To include pre-Act hires in the statistical analysis in this case would improperly weight the evidence and would tend to show present discrimination by an employer if it had discriminated prior to the effective date of the Act but had not discriminated after the Act took effect."

EEOC v. United Virginia Bank, supra, at 150." (Pet. App. 85a-89a)

Petitioners also attacked the district and circuit courts' analyses of the 1972 county chairmanship selections as "unorthodox" and erroneous. The district court's analysis was not unorthodox and the district court found no discrimination in each individual claims of CEC contested by petitioners. (82a-87a, 226a-316a).

A review of the district court decision shows the district court, rather than placing great weight post-Act statistics analysis, considered that the figures only served to point up their inherent unreliability to prove an inference favorable to one side or the other. (Pet. App. 81a).

The bottom line is that the district court found that NCAES had rebutted the statistical case by showing inaccuracy of proof, had adopted valid and non-discriminatory procedures for selections of CECs and had followed the procedures fairly, without bias or prejudice. (Pet. App. 100a-101a).

The court of appeals unanimously affirmed the district court's finding of no discrimination in the CEC selection claims. In so doing, the court of appeals duly noted that the district court's analysis of post-Act decisions from 1972 was proper under *Hazelwood* and that the district court had found there was no finding of intentional discrimination against any individual who had sought the chairmanship. (Pet. App. 406a, 422a). The court of appeals found that the raw comparison statistics

proffered to establish a prima facie case did not "tell the full story" (Pet. App. 407a) and acknowledged that *Hazelwood* required employers be given the opportunity to approve that each of its post-Act employment decisions was made in a non-discriminatory way. (Pet. App. 407a-408a).

The court of appeals then addressed the CEC statistical analysis of the district court and stated:

"While there may be some justification for the method of analysis by the district court, if we should consider that discrimination is against people and not applications, we think that, without deciding that either method is correct, a comparative analysis is worthwhile" (Pet. App. 412a).

The court of appeals then proceeded to focus on the recommendations made by NCAES instead of on the overall results. The result of such analyses led the court of appeals to find that the applications of blacks were approved at the same rates as whites, that raw statistics were completely refuted and even if the Extension Service had a burden to prove its decision free from discrimination it had done so. (Pet. App. 412a-423a).

Thus, both courts looking at the data in more than one method of analysis, came to the conclusion that petitioners statistics failed, but that in any event the NCAES had proved its CEC process and decisions were free from racial discrimination.

Having lost resoundingly at trial and on appeal, petitioners have now turned to arguments which infer the district court found a prima facie case of discrimination and that the error was in the determination of who was responsible for that discrimination. (Pet. Br. 70-71).

Petitioners assert that the court of appeals' analyses resulted in a decision to the effect that NCAES could delegate its final decision to the county commissioners and thus not be liable for their racial discrimination in selection. This is based on the incorrect assumption that there was proven discrimination in the actions of the

county commissioners in each selections challenged and disregards the fact that the district court examined each individual instance and found no evidence on racial discrimination in the selection by anyone. Yet, petitioners represent to this Court:

> "If, as actually occurred, the counties invariably preferred that NCAES hire only white chairmen, the fourth circuit held that NCAES had no legal responsibility for the result.' (Pet. Br. 74)

This misleading statement launches petitioners' sidetrack argument that this case was just like *Arizona Governing Board v. Norris*, 403 U.S. 1073 (1983). *Norris*, was decided because the facts showed that there was a violation of Title VII with respect to a sex based retirement plan administered by a third party. The underlying situation in *Norris* that the complained of plan was in fact sexually discriminatory was not at issue. Here, the facts and evidence found by the district court showed no discrimination. (Pet. App. 82a-87a-226a-316a).

The analysis of applications and recommendations by the court of appeals differed from the district court's in that it looked at recommendations by NCAES on which to apply its statistical analysis and in so doing found no discriminatory pattern. However, neither did the court of appeals find discrimination by the county commissioners en route to that conclusion. Nor did the court of appeals hold that the NCAES was not responsible for the decisions made in the CEC process. The court of appeals observed that "The Extension Service is not separately responsible for the appointment to fill the vacancy, but it is separately responsible for the recommendation of one or more of the applicants." (Pet. App. 412a-413a).

The petitioners' arguments that the decision violates *Norris, supra*, must be disregarded.

The U.S. properly realizes that *Norris* has no application or relevance in this case. (U.S. Br. 35-36). The

U.S., however, complains about the analyses of the "statistical" case with respect to the applicant flow and recommendations by the court of appeals. However, the U.S., like the petitioners totally glosses over the fact that no discrimination in any selection was found and that notwithstanding whether a prima facie statistical case was made on the basis of raw data, it was completely refuted. (Pet. App. 422a-423a). The decisions of both the district court and court of appeals should be affirmed.

III. NCAES' 4-H AND EXTENSION HOMEMAKER CLUBS ARE NON-DISCRIMINATORY AND IN COMPLIANCE WITH TITLE VI

NCAES, as do all other Extension Services, sponsors two voluntary participation community programs, 4-H and Extension Homemaker Clubs. Petitioners assert that the district court and panel majority incorrectly denied petitioners' claims with respect to an alleged affirmative duty on part of NCAES to force integrated membership in local Extension Homemaker Clubs and 4-H Clubs existing in racially mixed communities. Petitioners compare this to is a school case and utilize the catch phrase of "freedom of choice" plan to fit these voluntary programs into *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), which is inapplicable.

Extension Homemaker Clubs. Extension Homemaker Clubs are voluntary, volunteer groups formed in communities by adults and receive home economic and other advice and support from NCAES. It has been the policy that all extension homemaker clubs are to be organized without regard to race. NCAES agents encourage the formation of new clubs without regard to race. Announcements of this policy are published in the media. Despite this, clubs of one race exist and so do many clubs of both races (Pet. App. 165a).

There has been no evidence presented that since the adoption of this policy for extension homemaker clubs that one single black or white person has sought and been

denied membership on the basis of race in an extension homemaker club in North Carolina. (Pet. App. 166a-172a).

Indeed, *not one* of the thousands of members appeared at trial to testify of any racial discrimination in the Extension Homemaker Clubs or programs.

NCAES has created an integrated environment and the district found:

> "the evidence shows, and plaintiffs do not questions tnat for all phases of club activity above the community club level, all extension staff and volunteer leaders, all county wide, district and state meeting and training sessions are fully integrated." (Pet. App. 168a-169a; FN 53)

4-H and Youth Program. The 4-H and Youth Program is designed to develop good citizenship, character and to teach youth useful and practical skills. North Carolina ranks 7th in the United States in terms of black youth participation in 4-H. (Tr. 5107). 4-H is a voluntary program not a mandatory public school system. It is significant that from 1972 to 1980 participation by black youth rose to 30,243, while black volunteer leadership increased from 2,665 in 1972 to 4,022 in 1980. (DX 227).

Membership in 4-H is not static. It is open to youth 9 to 19 and membership is constantly changing. About ⅓ of the units are reorganized each year and consequently, the clubs are not static. (Tr. 5107) Out of the thousands of persons, black or white, who participated in 4-H from 1965 to time of trial, none came forward to testify that he or she had been discriminated against in connection with the 4-H program.

Except for the one incident involving a 4-H youth and volunteer leader, there has been no evidence presented of any person, black or white, being denied participation in or subject to discrimination in the 4-H program in North Carolina. 4-H is completely integrated in all activities beyond the community 4-H club level and has been for many years. (Pet. App. 167a-169a).

Black participation in 4-H has risen and not declined. This is conclusive proof that blacks participating in the 4-H programs in North Carolina do not consider their membershaip in the 4-H clubs "a badge of slavery" as petitioners previously argued.

Petitioners assert that NCAES failed to follow administrative "affirmative action" regulations. At trial Petitioners claimed "affirmative action" required all clubs of one race in a mixed community to merge with clubs of another race and if not the Extension Service would be required to withdraw services. (Pet. App. 166a-167a).

The district court found the 4-H and extension homemaker programs met the requirements of Title VI and were operated without discriminatory intent or purpose. (Pet. App. 170a-183a).

The district court also recognized that this was the same situation as "freedom of choice" school cases such as *Green* and that this is not a "freedom of choice" case. (Pet. App. 174a).

The critical issue facing the district court was what does the law require NCAES to do with respect to the existence of one race volunteer clubs which exist in racially mixed communities when there is no evidence of discrimination? Petitioners contended NCAES should require these clubs to merge with clubs in the same community that are another race, and should those efforts fail, to withdraw NCAES's services from those clubs. (Padgett Tr. pp. 1392, 2286; Reibman Tr. pp. 3231-3234).

The question is threefold. First, does the mere existence of a community extension homemaker club or a community 4-H club with members of one race existing in a racially mixed community violate Title VI and equal protection secured by the 14th Amendment? Second, do the USDA guidelines and their interpretations of all reasonable efforts have the force of law so that they must be followed by NCAES? Third, does the policy advocated

by the plaintiffs that services should be withdrawn from clubs located in mixed communities who have not denied membership on the basis of race to anyone, but remain all of one race, violate Title VI? Neither court below had to reach this last question to decide the case. (C.A. App. 62).

NCAES contends that the district court was correct in finding that the mere existence of an extension homemaker or 4-H club of one race which exists in a mixed community does not violate Title VI since there has been no exclusion, discrimination or denial of the benefits of the program.

Petitioners argue NCAES violated Title VI because it allegedly did not follow USDA guidelines which interpreted Title VI and the regulations promulgated thereunder with respect to the requirement of "all reasonable efforts" to achieve integration of clubs which exists in racially mixed communities. (Pet. Br. 94-95). An examination of the USDA regulations promulgated under Title VI, 7 CFR 15.1, *et seq.*, shows an absence of any requirement that an extension service withdraw services from a recipient of a program who has not subjected another person to discrimination on the basis of race.

At trial the district court requested the Petitioners to furnish authority that the USDA guidelines and interpretations of those guidelines with respect to the "all reasonable efforts" provisions are mandatory and must be followed by NCAES. No such authority has yet been furnished or cited. The reason is simple. Guidelines and interpretations are not regulations and are not mandatory. *United States v. City of Chicago*, 573 F.2d 466, at 427 (7th Cir. 1978), *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979).

Despite this, the Petitioners argue that the USDA's "guidelines" are mandatory and a one race club existing in a mixed community would be subject to the withdrawal of NCAES services for remaining one race. The only reason for the withdrawal of services in such instance would be on account of race of the members, black or white, which we contend violates Title VI. The evidence clearly shows NCAES has taken appropriate affirmative action in 4-H and Extension Homemaker programs.

IV. THE DENIAL OF CLASS CERTIFICATION WAS CORRECT

This action was initially filed as a class action seeking purported class wide relief pursuant to Rule 23, Federal Rules of Civil Procedure on behalf of 4 proposed classes and 1 class of defendants. The four classes of plaintiffs were (1) all black and Indian employees of NCAES from November 18, 1971 thereafter (2) all black and Indian persons receiving services from NCAES on November 18, 1971 and thereafter (3) all black and Indian members or potential members of NCAES 4-H Clubs on November 18, 1971 and thereafter and (4) all black and Indian members or potential members of NCAES Extension Homemaker Clubs on November 18, 1971 and thereafter. The proposed defendant class were all county commissioners in North Carolina in their official capacities on November 18, 1971 and thereafter. (C.A. App. 46)

Following discovery both petitioners filed motions seeking certification of all 5 classes in January, 1975. NCAES opposed the class certification motions. On October 9, 1979, the district court denied certification as to all proposed classes. (J.A. 74-79) After re-opening discovery in July, 1981, the private petitioners again moved for class certification by means of a motion to reconsider. NCAES opposed the motion. On July 28, 1981, the district court denied the motion again because of lack of commonality and similar situations. (J.A. 87) Private petitioners continued to press for class certification even though the action was proceeding as a pattern or practice action seeking relief as broad as any possible under Rule 23.

The case was tried as a pattern or practice case. The private petitioners post-trial submittals incorporated all

of the relief set out in the United States' post-trial proposed decree and sought identical relief. (Peta. Mem. and Proposed Conclusions of Law and Fact filed 2/8/82)

Because of the previous discussions concerning the organization of NCAES, the operation of the employment practices, 4-H and Homemaker Extension Clubs and Boards of County Commissioners it is not necessary to the facts which clearly show that no class certification was permissible under Rule 23. NCAES respectfully directs the Court's attention to the district court's decision and the Statement of Facts contained in this Brief as to why the employee class was correctly denied. It is clear that NCAES county personnel are not situated in similar across the board jobs. The hiring and salary from county to county varies and the actions of 100 autonomous and separate Boards of County Commissioners do not affect any class of blacks or whites. Blacks are scattered throughout the state, each holding different jobs and performing different responsibilities. The only commonality is race and that factor is insufficient for class certification. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

The petitioners do not seek class certification the class which purportedly consisted of all black recipients of services. As pointed out earlier, the claims of discrimination in services were denied as no evidence was presented to support any such claims.

With respect to classes 3 and 4, the 4-H and Extension Homemaker Clubs, the district court found that at trial no members of the purported class of plaintiffs appeared, that there was no evidence that any black female was ever denied membership in any club, was provided inferior services or discriminated against by NCAES in connection with home economics or extension homemaker clubs. Likewise, there was no member of the purported class of 4-H members who appeared at trial to testify nor was there any evidence that any black child had been denied

services or membership in a 4-H Club except for 1 instance which was immediately corrected. There was no evidence of any denial of membership or services or inferior services whatsoever. (C.A. App. 47-48)

The district court found that all that was present were "bare, conclusory allegations of the complaint" unsupported by any evidence and that such was insufficient to establish a class. (C.A. App. 47-48)

The court of appeals noted that:

> "the plaintiffs do not take exception either to the findings of fact of the district court or to its conclusion that the class should not have been certified on the basis relied upon by that court". (Pet. App. 370a-371a)

Since there was no evidence of discrimination in the first place, there was obviously no class to exist.

Petitioners still claim error in refusing to certify a class of defendants of all county Boards of Commissioners in 100 counties in North Carolina. The decision to deny class certification of this purported defendant class was correct. Boards of County Commissioners are independent autonomous entities. The actions of one are not binding on another. Just as local boards of education are independent, Boards of County Commissioners are likewise. Each board makes its own decisions. There was no evidence of any standardized practice among the 100 separate counties in the state and many counties had no black NCAES agents or populations which were miniscule. (Pet. App. 47a-48a)

This Court's decision affirming denial of class certification of 92 South Carolina independent school districts supports the decision. *United States v. State of South Carolina*, 434 U.S. 1026 (1979) as did *Paxman v. Campbell*, 612 F.2d 848 (en banc) (4th Cir. 1980) holding class certification of 130 Virginia Boards of Education inappropriate. Nothing further needs be said here. Denial of class certification was correct.

Petitioners, however, leave the facts out of their class action arguments to this Court and launch into misleading arguments to the effect that the class action decision literally stood *General Telephone* on its head. This argument is brought about because both the district court and the court of appeals correctly recognized that the case was tried hand in glove by petitioners as a pattern or practice action and that the relief available was the same as if a class had been certified. *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980).

The decision of the district court was characterized by petitioners as holding that class certification was never permissible in a Title VII action if the EEOC or United States had also filed a pattern or practice suit. (Pet. Br. 100) This characterization is inaccurate.

General Telephone permits the government to seek and obtain relief on behalf of a group of aggrieved individuals under Title VII without having to comply with the strictures of Rule 23. *General Telephone*, *supra*, 331.

General Telephone held that the government could seek relief as broad as possible without being tied down to Rule 23 regardless of the lack of typicality or commonality of claims between persons for whom relief was sought. Nowhere was the *General Telephone* rationale more welcomed than here where no class was found to be proper under Rule 23. (J.A. 73-79) Hre, rather than lose the clout of a class action, the pattern or practice action permitted petitioners all the relief they could have gotten if successful as a class. Because of this the district court determined correctly that under *General Telephone* class action certification is unnecessary and to *require* it is inappropriate in pattern or practice actions. This was because Rule 23 cannot be imposed to limit a pattern or practice claim nor can the failure to meet Rule 23 be a bar to a pattern or practice claim. A reading of the district court's decision on class action denial will clearly show *General Telephone* was not stood on its head. (Pet. App. 33a-47a)

Petitioners have failed to point out a single disadvantage which has accrued to them at trial by not receiving class certification. Had they won, the relief they requested was the same as that sought by the U.S. (Pet. App. 373a)

Finally, in a last ditch effort to further confuse the class question and direct attention from the fact that petitioners had all the relief available to them by virtue of the pattern or practice case and suffered no prejudice by the correct decision denying the classes, petitioners muddy the picture claiming the court of appeals decision conflicted with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). That decision has no application here. *Eisen* involved two issues whose relevance, if any, to this case is highly questionable. The first was whether or not the determination of class certification and requirements that defendants pay a part of the statutory notice requirement were "appealable" as a "final order" under 28 U.S.C. 1291 and the second was whether the district court's order directing defendants to pay part of the cost of notice after a hearing on the merits was in violation of Rule 23.

Any resemblance of *Eisen's* issues to the district court or court of appeals appears to be imaginary. The district court denied certification after discovery. The simple fact is that the petitioners proceeded with the U.S. hand in glove seeking identical relief at trial. When they lost, they claimed error in class certification but have shown no prejudice because of it and the facts show certification was inappropriate here.

CONCLUSION

For the reasons stated above, the decisions of the district court and court of appeals should be affirmed.

Respectfully submitted this — day of February, 1986.

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APPENDIX

EXHIBIT A—COMPARISON CHART

This exhibit compares salaries of black agricultural agents who were employed by NCAES on July 1, 1965 and as of July 1, 1972, were full agricultural agents with salaries of white agricultural agents who were employed by NCAES on July 1, 1965 and as of July 1, 1972 were full agricultural agents. The salaries compared were those of both groups on July 1, 1972. The only information provided is county and salary as of July 1, 1972. White agents are designated as "White". The comparison does not include performance or other factors affecting salary. There are 42 black agents in this group. There are 65 white agents. Asterisk by those, black or white, who later applied for and were appointed County Extension Chairmen.

SOURCE OF DATA: GX-56; GX-125; PX-2; JA. 114-126

LeRoy Johnson (1890 program)	$16,900.00	
William S. Lamm—Wayne	$15,458.00	WHITE* Became CEC
Thomas H. Godwin—Wayne	$15,361.00	WHITE* Became CEC
Charles M. Turner—Rockinham	$14,930.00	WHITE
Frank H. Baker—Wayne	$14,562.00	WHITE* Became CEC
T. D. Williamson—Rockingham	$14,486.00	
George McDaniel—Wayne	$14,239.00	
Franklin Greene—Rockingham	$14,027.00	WHITE
P. E. Bazemore—Union	$13,984.00*	Made more than 47 CEC's 1971
Glenn Gartner—Mecklenburg	$13,764.00	WHITE
Booker T. McNeil—Cumberland	$13,724.00*	Became CEC
William Wright—Nash	$13,418.00	
B. A. Hall—Guilford	$13,358.00	
Walter P. Farrior, Jr.—Wilson	$13,342.00	WHITE
William Mainous—Forsyth	$13,328.00	WHITE
S. N. Shelton—Orange	$13,302.00*	Became Program Leader
Cyrus A. Greene—Orange	$13,248.00	WHITE
Ray A. Kiser—Stanly	$13,032.00	WHITE
John D. Carroll—Guilford	$12,962.00	WHITE
Walter H. Bowers—Montgomery	$12,955.00	WHITE* Became CEC

Elbert E. Bishop—Cabarrus	$12,942.00	WHITE
Hernando Palmer—Johnston	$12,886.00	
Connie Jernigan—Cumberland	$12,785.00	WHITE* Became CEC
Howard L. Dalton—Guilford	$12,699.00	WHITE
Plese Corbett—Alamance	$12,684.00	
Wade W. Johnson—Davidson	$12,674.00	WHITE
David Waymer—Mecklenburg	$12,516.00	
Leonard Allen—Johnston	$12,432.00	WHITE
Judge A. Pierce—Rockingham	$12,414.00	WHITE
L. Baldwin—Franklin	$12,373.00	
Carol Baker—Union	$12,331.00	WHITE* Became CEC
Howard Stamey—Iredell	$12,294.00	WHITE
Lloyd Peace—Vance	$12,270.00	
Murray L. Godwin—Chowan	$12,254.00	WHITE
Kenneth E. Vaughan—Chatham	$12,230.00	WHITE
Donald W. Baker—Columbus	$12,225.00	WHITE* Became CEC
Horace L. Miller—McDowell	$12,218.00	WHITE* Became CEC
Earl Swann—Alamance	$12,200.00	
H. Eugene McCall—Haywood	$12,166.00	WHITE* Became CEC
Roderick Morris, Sr.—Bladen	$12,120.00	WHITE
Burton H. Taylor—Guilford	$12,093.00	WHITE
John Vanstory—Caldwell	$12,080.00	WHITE
Douglas Young—Randolph	$12,066.00	WHITE
George P. Upton, Jr.—Sampson	$12,048.00	WHITE
L. Cooper—Warren	$12,045.00*	Became CEC
Bobby Peek—Buncombe	$12,020.00	WHITE
Earl H. Smith—Henderson	$12,020.00	WHITE
M. C. Howell, Jr.—Union	$11,992.00	WHITE* Became CEC
Guyler F. Heath, Jr.—	$11,969.00	WHITE
James P. Bowles—Cabarrus	$11,950.00	WHITE
I. W. Murphee—Granville	$11,918.00	
Madison K. Dennis—Bladen	$11,916.00	WHITE* Became CEC
Robert M. Bowden—Vance	$11,882.00	WHITE
Richard A. Hayes—Greene	$11,867.00	WHITE
James West—Wake	$11,864.00*	Became Dist. Chairman
Walden M. Hearn—Pasquotank	$11,824.00	WHITE
LeRoy James—Pitt	$11,743.00*	Became CEC
Fletcher Barber—Jones	$11,753.00	
Dan E. Baucom—Onslow	$11,729.00	WHITE
Riddick Wilkins—Duplin	$11,684.00	
Hoover Royals—Anson	$11,597.00*	Became CEC
Woodrow C. Richardson—Watauga	$11,584.00—	WHITE

Jack Barnes—Stokes	$11,546.00—	WHITE
R. M. Edwards—Martin	$11,541.00	
Chester Bright—Beaufort	$11,492.00	
John Spaulding—Columbus	$11,443.00	
Snodie Wilson—Duplin	$11,422.00	WHITE
James C. Weaver—Montgomery	$11,360.00	WHITE
C. J. Cameron—Scotland	$11,352.00	WHITE
James C. Barber, Jr.—Gaston	$11,351.00	WHITE
Slater Lloyd—Granville	$11,346.00	
Rufus H. Rhyne—Stokes	$11,336.00	WHITE
Cleo Greene—Pender	$11,301.00	
William Strowd—Perquimans	$11,267.00	
Howard Waynick—Lincoln	$11,260.00	WHITE
John H. Wynne—Pender	$11,240.00	WHITE
O. G. Garland—Swain	$11,131.00	WHITE
Douglas W. Easton—Northampton	$11,139.00	WHITE
Pieter J. Westerbeek—Sampson	$11,017.00	WHITE
James Wright—Hertford	$10,985.00*	Became CEC
Stanley C. Corriher—Rowan	$10,979.00	WHITE
P. Williams—Pasquotank	$10,875.00	
Boyd C. Campbell—Henderson	$10,785.00	WHITE (14)
Samuel Little—Pender	$10,772.00	
Clifton Grimes—Gates	$10,766.00	
Avant Coleman—Wilson	$10,712.00	
K. T. Patterson—Alexander	$10,681.00	WHITE
Herbert Sproles—Gaston	$10,666.00	WHITE
Wiley Payton—Lenoir	$10,620.00	
Al. L. Smith, Jr.—Lincoln	$10,622.00	WHITE
Joseph Turner—Chatham	$10,585.00	
V. J. Goodmon—Richmond	$10,559.00	WHITE
Walter E. Garrand—Person	$10,555.00	WHITE
George Bowers—Cherokee	$10,406.00	WHITE
Raymond D. Phillips—Halifax	$10,394.00	WHITE
William Clayton—Johnston	$10,366.00	
Clarence Stockton—Robeson	$10,333.00	
Fred Belfield—Nash	$10,324.00	
Warren Barnes—Union	$10,228.00	
Thomas W. DuVall—Madison	$10,130.00	WHITE
Everett Hartzog—Yadkin	$10,106.00	WHITE
Chester Stocks—Lenoir	$ 9,892.00	
Ernest Short—Rowan	$ 9,879.00	
George Koonce—Warren	$ 9,873.00	
Robert F. Breland—Ashe	$ 9,717.00	WHITE
Bobby C. Armstrong—Tyrrell	$ 9,345.00	WHITE
Calvin Hargrove—Edgecombe	$ 9,246.00	

REPLY

BRIEF

Supreme Court, U.S.
FILED
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Nos. 85-93 and 85-428

In the Supreme Court of the United States

OCTOBER TERM, 1985

P.E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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In our opening brief, our primary argument was that the court of appeals erred in holding that black state employees did not establish a claim under Title VII by (a) demonstrating current salary disparities between themselves and similarly situated white employees, and (b) showing that these current disparities result from a state policy, implemented before 1965, of paying blacks less than whites.

The Service's response is mostly factual. Respondents appear to suggest (Br. 33-34 & App.)[1] that there were no pre-Act salary disparities between blacks and whites, and also to argue (Br. 30-34) that any such disparities that did exist were not intentional. They also contend (Br. 27-28) that all jobs in the Service are sufficiently different to invalidate any comparison between salaries of black and white employees to ascertain if salary disparities are racially based. None of these contentions has merit.

We also disagree with several points made by private petitioners. Private petitioners make the largely factual argument that the post-Act system of admissions to Extension Service related clubs has not been truly open and nondiscriminatory; they also contend that the Service is vicariously liable for discrimination by various counties in the selection of county chairmen.

1. Insofar as the Service suggests (Br. 33-34 & App.) that there were no pre-Act racially-based salary disparities, this is contrary to the concurrent findings of the courts below.[2] The district court found

[1] "Br." refers to the brief for the respondents. "Br. App." refers to the appendix bound with that brief. "Pet. App." refers to the separately bound appendix filed with the petition in No. 85-93. "U.S. Pet." refers to the petition in No. 85-428. "U.S. Br." refers to the brief for the federal petitioners. "Pet. Br." refers to the brief filed by the private petitioners. "Am. Br." refers to the amicus curiae brief filed by the AFL-CIO. "C.A. App." refers to the 10-volume court of appeals appendix, 10 copies of which have been lodged with this Court.

[2] Moreover, the Service's comparison chart (Br. App. 1a-3a), listing 1972 salaries of pre-1965 hires, does not demonstrate that blacks were paid as much as comparable whites, as the chart does not account for such factors as tenure and education.

it "undisputed" that before the merger of the black and white branches in 1965, the Service paid black agents less than white ones (Pet. App. 120a), and the court of appeals adopted this finding (Pet. App. 359a). While it is true, as the Service points out (Br. 32), that neither court below found that the racial disparities were based on pre-Act intentionally set "wage scales," this is not dispositive of the question of intentional discrimination. A purposeful decision to pay black employees less than comparable white employees, whether based on wage scales or on individual case-by-case determinations, constitutes intentional discrimination.[3]

2. Nor does the Service's suggestion (Br. 31-32) that the competitive market was such that black agents could be hired and retained at lower salaries than white agents negate the finding of intentional discrimination. A purposeful decision to pay blacks lower salaries than whites because of their race violates Title VII, regardless of whether intentional discrimination in pay is more economical for the employer.

We argue simply that the continued intentional payment of discriminatory salaries to blacks consti-

[3] The Service contends (Br. 30-31) that it based its pre-1965 salary determinations for black agents, at least in part, on recommendations made by the "Negro state agent" who headed the Service's "Negro Branch" before the 1965 merger. This Court has declined to "presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977). Moreover, regardless of the intent of the individual making salary recommendations for agents in the Negro Branch (within whatever budgetary restrictions may have been imposed on him by the Service), the Service was ultimately responsible for the salaries in the two branches.

tutes a continuing violation of Title VII (see U.S. Br. 18-20). If amici AFL-CIO intend to suggest that a racially neutral policy (dealing, for example, with promotions or incentive bonuses), consistently applied since the enactment of Title VII, constitutes a "present violation" of the Act, simply because policies previously followed placed blacks in a less advantageous position and they have failed to "catch up," we seriously disagree. Such an analysis would be directly contrary to the rule that Title VII imposes on the employer no responsibility to eliminate a practice which "gives present effect to a past act of discrimination." *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977). For, if a nondiscriminatory failure to correct the continuing effects of pre-Act discrimination constituted a "present violation" of Title VII, then the employer who discriminated on the basis of sex before 1972 in *Evans* would have committed a "present violation" by refusing to alter the "victim's" seniority, and the employer in *Hazelwood* who discriminated in hiring before the Act necessarily would have been in "present violation" to the extent it had not remedied the pre-Act discrimination.[4]

Here, there has been a violation of Title VII because the employer has purposely continued his dis-

[4] Contrary to the suggestion of the AFL-CIO (Am. Br. 13), we have not argued that continuation of a non-bona fide seniority system violates Title VII, in the absence of post-Act discrimination. All that we argued (U.S. Pet. 18) was that such a system adopted for discriminatory purposes prior to the Act is not entitled to protection under Section 703(h), because "an intentionally discriminatory pre-Act [seniority] system * * * affords no justification for current [employment] practices that have a race-based effect * * *." See also U.S. Br. 20. We do join the AFL-CIO in the view that the Court need not decide whether a discriminatorily adopted pre-Act seniority system necessarily violates Title VII.

criminatory system subsequent to the enactment of Title VII. With respect to salary, a victim of discrimination suffers with each check he receives, and the employer intentionally discriminates with each check he issues. It is the continuing intentional discrimination that inheres in the employer's salary payments that violates Title VII. Rather than simply failing to remedy the effect of a discrete pre-Act discriminatory action, the employer here continues its intentional discrimination on the basis of race (see U.S. Br. 18-20).[5]

3. The Service also contends (Br. 27-29) that no valid comparison of black and white agents' salaries is possible because agents are not similarly situated

[5] The AFL-CIO incorrectly attributes to the federal petitioners the view "that pay discrimination under Title VII cannot be proved circumstantially" (Am. Br. 8-9 n.6). Our position is simply that "the plaintiff in [a] discriminatory treatment case under Title VII must establish not only * * * disparity in wages, but also the employer's intent to discriminate." U.S. Pet. 18 n.20. We do not understand the AFL-CIO or any other party or amicus to dispute the prerequisite of intent, which is compelled in the disparate treatment context by *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Nor do we suggest that this requisite intent cannot be proved by circumstantial evidence —just that it must be proved. This necessarily requires examination of the reasons for any pay disparity to determine whether there has been intentional discrimination subject to a timely challenge (see U.S. Pet. 18 n.20). The point is that, while the Equal Pay Act provides that an employer will be liable based solely on a sex-based pay disparity (see *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974)), Title VII holds liable for disparate treatment only employers who have intentionally discriminated. See note 9, *infra*. Thus, irrespective of how intent is proven, it remains true that "a current disparity in salaries, without more, cannot be the basis for this Title VII claim of discriminatory treatment" (U.S. Br. 20 n.18).

and do not perform identical jobs. Contrary to the Service's suggestion (Br. 29), the United States has not conceded and does not concede this point. To be sure, we acknowledged that county-by-county differences "should have been accounted for as part of petitioners' case in chief" (U.S. Br. 30). But we also argued that it was not necessary to include such differences as part of the regression analyses because they were explained by other evidence demonstrating that county-by-county differences were *not* the reason for salary disparities between black and white agents (U.S. Br. 30-31).[6]

Under these circumstances, petitioners carried their burden. The evidence demonstrated that statistical differences were explained neither by county-by-county differences nor job performance (see U.S. Br. 30-33), and that the regression analyses controlled for other pertinent variables; the evidence accordingly negated "the most common nondiscriminatory reasons" for the salary disparity. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). It is because the proof at trial established these elements that petitioners made out a

[6] The Service argues that our regression analyses, "using only race, degree and tenure as variables, accounted for only 53% of the total salary variation that existed among agents and chairmen", apparently suggesting that this was because of inclusion of county chairmen in the data base (Br. 38). The Service is using a statistic known as "R^2", which determines the explanatory power of a regression analysis. In fact, the R^2 factor for the key regression analysis in this case—Dr. Giesbrecht's analysis including race, education, tenure, job level and quartile rank (job performance) as variables and *excluding* county chairmen—was even higher (66% rather than 53%) (C.A. App. 1500, 1713, 1716). This statistic indicates that the explanatory power of the critical regression analysis was high. Cf. D. Baldus & J. Cole, *Statistical Proof of Discrimination* 338-339 (1980).

case of disparate treatment. Hence, it is unnecessary to rely on private petitioners' argument (Pet. Br. 50-52) that a Title VII disparate treatment plaintiff carries his burden merely by showing that blacks as a class make less than whites with the same job title (see *ibid.*). Nevertheless, such a showing would be insufficient in light of *Burdine*'s dictate that plaintiffs must eliminate "the most common nondiscriminatory reasons" for the challenged action (450 U.S. at 254) in order to establish a prima facie case. Job title is only one nondiscriminatory criterion; it does not encompass performance, seniority, qualifications, or other usual nondiscriminatory selection factors.[7]

[7] Petitioners state that presentation of a prima facie case "shifts to the defendant the burden of adducing evidence that the disparity [between black and white salaries] was *caused* by [a] * * * nondiscriminatory criterion" (Pet. Br. 53) (emphasis added)). Two qualifications should be added to this statement. First, while *Burdine* made clear that an employer against whom a prima facie case has been made is charged with the burden to " 'articulate some legitimate, nondiscriminatory reason' " for the action (450 U.S. at 253, citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)), it also held that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated * * * remains at all times with the plaintiff" (450 U.S. at 253 (citations omitted)). Second, if the plaintiff's proof has not accounted for factors that directly affect salary in a major way, the employer may defend by pointing out that the plaintiff's statistical evidence is not sufficient to give rise to a finding of discrimination (U.S. Br. 24-25, 33 n.34).

This allocation of proof applies to all disparate treatment cases, whether based on allegations of individual or pattern or practice discrimination. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 360-361 n.46 (1977) (employer's burden to rebut prima facie case of pattern or practice disparate treatment is to show that plaintiffs' proof is "inaccurate or insignificant * * * [or] to provide a

Here, petitioners employed adequate controls in their regression analyses [8] which, when considered in tandem with other evidence, negated the most common nondiscriminatory reasons for the challenged disparity. It is for this reason, not because some lesser showing is required to establish a prima facie case of disparate treatment, that the lower court's ruling on this point should be reversed.[9]

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nondiscriminatory explanation for the apparently discriminatory result"). In contrast, the requirement of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)—that an employer against whom a prima facie case of discrimination has been made has the burden of showing that a selection criterion is job-related—has no application where, as here, the allegations are of disparate treatment rather than disparate impact (contra Pet. Br. 67-68). Intent must be proven to make out a claim of disparate treatment under Section 703(a)(1) of Title VII.

[8] Although we have argued that a regression analysis need not include every conceivable variable, so long as the most common nondiscriminatory reasons for the disparity are negated by a plaintiff's case-in-chief, the inclusion of job title as the *only* independent variable would render the regression analysis of dubious evidentiary value, even if independent proof were offered with respect to other variables. The very value of multiple regression analysis lies in its assessment of the effects of the independent variables believed to influence the dependent variable (here, salary). See generally, Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705-706 (1980); see also Gwartney, Asher, Haworth & Haworth, *Statistics, The Law, and Title VII; An Economist's View*, 54 Notre Dame Law. 633, 654-659 (1979). Limitation of the independent variables to one thus would leave the analysis with little explanatory power.

[9] While a Title VII disparate treatment plaintiff must prove intentional discrimination under the *McDonnell-Douglas* standard, the Equal Pay Act establishes liability based on a mere disparity of pay between men and women. Although the Bennett Amendment incorporated in Title VII the Equal

4. The Service contends (Br. 32-33) that petitioners did not appeal, and therefore cannot now challenge, the district court's finding (Pet. App. 163a) that petitioners did not establish "[a] violation by the defendant of any duty, statutory or otherwise, 'to take appropriate action to correct the present effects of past racially discriminatory policies and practices'." The Service errs in suggesting that the district court found as a matter of fact that there was a lack of proof that the Service failed to correct the present effects of past discrimination. Indeed, the district court found the existence of pre-Act salary disparities "undisputed," and found that these disparities had not been fully eliminated by 1972 (Pet.

Pay Act's affirmative defenses with respect to sex discrimination, it did not alter Title VII's definition of violation and thus did not modify a Title VII plaintiff's prima facie case. See *County of Washington* v. *Gunther*, 452 U.S. 161, 178-179 (1981). In any event, private petitioners have oversimplified an Equal Pay Act plaintiff's burden, because the Act requires proof that disparity in pay is for "equal work"—work which "requires equal skill, effort and responsibility, and which [is] performed under similar working conditions." 29 U.S.C. 206(d)(1). Inherent in any such proof is a showing that the disparity was not caused by several common nondiscriminatory reasons, *e.g.*, differences in requisite skill, effort, responsibility, working conditions, etc. Moreover, in weighing the evidence at the close of a case, see *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1983), an Equal Pay Act plaintiff's burden is not significantly different from a Title VII plaintiff's burden insofar as overall proof of salary disparity is concerned. Because there is no liability where pay differences are due to a seniority or merit system or to "any other factor than sex" (*ibid.*), an Equal Pay Act plaintiff, like a Title VII plaintiff, effectively must demonstrate the absence of the more common legitimate non-sex-based explanations for pay differences.

App. 30a-31a, 120a-121a), and the court of appeals concurred in these findings (Pet. App. 359a-360a). But the court of appeals also reached the *legal* conclusion that such a failure on the part of the Service does not constitute a violation of Title VII. The United States appealed that ruling, and included it in its petition for certiorari.[10]

5. As we have argued (U.S. Br. 35), private petitioners' contention that the court of appeals should have held the Service vicariously liable for the counties' employment decisions relating to county chairmen (see, *e.g.*, Pet. Br. 70-86) is not before the Court, since the Service shared responsibility for such discriminatory decisions and is liable for its own discrimination. If the Court chooses to address the question, however, we submit that the Service may not be held vicariously liable for discriminatory actions by county officials. Title VII requires that covered employers not discriminate in their own employment practices; it does not make them "the guarantors of the workers' rights as against third parties who would infringe them." *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 396 (1982).

[10] The private petitioners also argue that the continuation of an intentionally discriminatory pay system violates the Fourteenth Amendment (Pet. Br. 40-45). Since there is a violation of Title VII, however, it is unnecessary to consider the constitutional question. It is well established that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. * * * Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Private petitioners attempt to distinguish *General Building Contractors* on the ground that Section 1981 (which was at issue in that case) requires a showing of intent, whereas Title VII also forbids employment practices which have the effect of discriminating on the basis of race (Br. 83) Such a distinction has no significance with respect to this case since, as we have seen, intent is a necessary element of a plaintiff's Title VII disparate *treatment* cause of action. But, more fundamentally, a Title VII violation requires some discriminatory action by the defendant, regardless of whether the case is based on disparate treatment or impact. An "unlawful employment practice" by an employer is required for the employer to be in violation of either Section 703 (a)(1) or (2) of Title VII. Thus, an employer violates Section 703(a)(1) only where it affirmatively "discriminate[s] against an[] individual with respect to his compensation, terms, conditions, or privileges of employment" based on race. Similarly, an employer violates subsection (2) only when it "limit[s], segregate[s] or classif[ies]" its employees based on race. There is no hint in the language or legislative history of the statute that an employer who does none of these things can violate Title VII because of the conduct of others.[11]

The Court's decision in *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), does not suggest a contrary result. In *Norris*, state employees

[11] We do not understand private petitioners to argue that the act of delegating hiring decisions to the county officials is itself a discriminatory action within the meaning of Section 703(a)(1). To establish such a claim, a plaintiff would have to establish that the very act of delegation had a discriminatory purpose. In this case, petitioners have not attempted to make that showing.

were required by their employer to select a plan from one of several private annuity companies, all of which discriminated on the basis of sex. To be sure, the Court found a violation of Title VII, but not because a discriminatory decision was made by any or all of the annuity companies.[12] Rather, as private petitioners appear to concede (Br. 77 & n.46), the State violated Title VII by "creat[ing] a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State" (463 U.S. at 1089), and each of the companies selected by the State offered only discriminatory plans. Thus, it was the State that made an employment decision in *Norris* that violated Title VII, by limiting employees to plans that discriminated on the basis of sex. As we have seen, the Service similarly violated the Act because it cooperated with county officials in employment discrimination.[13] But the Service would not be responsible

[12] Indeed, the Court in *Norris* (463 U.S. at 1086) reaffirmed its observation in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 717-718 (1978), that an employer would not violate Title VII by simply providing equal amounts for each employee to buy whatever benefit was available to him on the open market—even if the only annuity plans available offered lower benefits to women than to men (*Manhart*, 435 U.S. at 718). The only limit on the employer's authority noted in *Manhart* is that delegations cannot be to a "corporate shell" (*id.* at 718 n.33). There is no suggestion that the counties were "shells."

[13] Plaintiffs would have a cause of action against the counties based on their discriminatory hiring decisions, at least if the counties were shown to be "employers" or "agents" of the employer (see 42 U.S.C. 2000e(b)). Such a showing would probably not be difficult on the facts of this case, if the counties had been included in this lawsuit. Because Title VII will almost invariably provide a basis for redressing unlawful discrimination by a covered employer or his agent, there is no need to read a "vicarious liability" cause of action into the statute.

for the employment decisions of discriminating third parties in the absence of its own discriminatory conduct.[14]

6. Private petitioners asked this Court to grant certiorari to determine whether retention of a "free choice" admissions program in 4-H and Extension Homemakers clubs that leaves some all-white and some all-blacks clubs fails as a matter of law to satisfy the state's affirmative duty to desegregate (see Pet. Br. i-ii, Question 3; *id.* at 45-49). In their merits brief, however, petitioners present an entirely different, fact-bound argument that there has been intentionally discriminatory recruitment of new club members since termination of the de jure system in 1965 (Pet. Br. 92-93, 95-96). Adopting the analysis first articulated by Judge Phillips in dissent below, private petitioners maintain that the courts below ignored evidence of such post-Act intentionally discriminatory recruitment because of the courts' mistaken view that only discrimination in actual admis-

[14] Since it is unnecessary to reach private petitioners' argument that Title VII makes the Service a guarantor of employees' rights against discriminatory treatment by third parties, it is *a fortiori* unnecessary to consider whether the Constitution places such burdens on an employer (see Pet. Br. 78-86). But, in any case, private petitioners do not explain why the Fourteenth Amendment would create a nondelegable duty to protect persons from discrimination by others; indeed the creation of such a duty is inconsistent with the state action limitation of the Equal Protection Clause. As with the Title VII issue, it is quite possible that private petitioners would have a constitutional claim against the Service to the extent that the Service joined in racial discrimination, but again there can be no vicarious liability.

sions, not recruitment, was prohibited by Title VI and the Constitution (Pet. Br. 93-96; Pet. App. 475a-481a). Intentionally discriminatory recruitment practices obviously violate statutory and constitutional requirements. But contrary to private petitioners' suggestion, nothing said by either court below in any way indicates that they misunderstood this basic principle. The record, however, is devoid of any evidence suggesting any discriminatory recruitment and, *a fortiori*, any evidence sufficient to overturn as clearly erroneous the concurrent findings of the courts below finding no discrimination in the Service's conduct of the clubs.

Both courts below found that defendants adhered to a policy of nondiscrimination with respect to the formation and operation of the clubs.[15] Indeed, plaintiffs presented no evidence concerning the *racial composition* of the clubs formed after 1965 (let alone of segregative conduct in their formation or membership policies), because, contrary to Judge Phillips' and private petitioners' suggestion, no party ever

[15] Private petitioners rely on deposition testimony that the "makeup of local clubs" has been determined by a "local volunteer" (Pet. Br. 92). Contrary to petitioners' suggestion, the quoted testimony simply states the obvious fact that voluntary leaders were responsible for the admission and overall membership process in the clubs; it does not in any way indicate that such volunteers determine the "*racial* makeup" of these clubs (Jan. 30, 1973, Blalock Dep. 74). That testimony did not otherwise suggest that race was a recruitment or admissions criterion. The remaining cited transcript excerpts simply state the witness's view that the black and white communities would resist forced merger of clubs (Tr. 4996-4999, 5121-5122; J.A. 99). None of these statements indicates that the Service or community would resist voluntary integration, or that the Service in any way discouraged integration or excluded any person from recruitment or admission to clubs.

drew any distinction between clubs formed before or after the *de jure* era.[16]

It was obviously because of this complete absence of evidence, not any misconception concerning the scope or requirements of the Constitution or Title VI, that neither lower court used the specific word "recruitment" when it found that the "formation" and "services" of the clubs were nondiscriminatory, or specifically addressed the question of whether the

[16] We note that the number of integrated 4-H Clubs grew nearly three-fold between 1972 and 1980 (586 to 1442) (C.A. App. 1807). While these seriously incomplete statistics do not tell us very much about the racial composition of clubs formed after the *de jure* period, neither these figures nor any others in the record support petitioners' assertion that "[s]ince 1965 a substantial number of new single race clubs have been organized in racially mixed communities" (Pet. Br. 92). If anything, these statistics indicate precisely the opposite: *i.e.*, that the newly formed clubs are generally integrated, while the older clubs remain substantially one-race. Of course, even this tentative inference is based on the speculative assumption that the 880 one-race clubs remaining in 1980 were, for the most part, among the 892 one-race clubs existing in 1972, and that the increased number of integrated clubs primarily resulted from formation of new clubs. There is no evidence in the record concerning whether the one-race clubs in 1972 are the same as the 1980 one-race clubs or any other evidence relating to which clubs were one-race and when they were formed. The uncertainty concerning these statistics is also greatly compounded by the fact that the clubs are extremely fluid in their membership and organization. For example, about one-third of all the 4-H Clubs are reorganized each year (Tr. 5107). Accordingly, it is not even clear what number, if any, of the clubs formed during the *de jure* period still exist today. Finally, the statistics on clubs relate to all 4-H Clubs (community clubs, project clubs and special interest clubs) while petitioners challenge only the membership of the community clubs (Tr. 4443).

respondents had engaged in segregative conduct after 1967.[17]

Thus, the sole remaining question is whether a state entity fulfills its affirmative desegregative duty where, as here, admissions are normally determined by voluntary choice, if it establishes a genuinely race-neutral admission system and refrains from segregative conduct. The private petitioners rely exclusively upon *Green* v. *School Board*, 391 U.S. 430 (1968) to argue that such a remedy is constitutionally inadequate. As we explained in our initial brief (U.S. Br. 40-50), *Green* stated no such rule.

To be sure, *Green* held that a public entity which has engaged in de jure racial segregation has an affirmative duty to desegregate and with that proposition we readily agree.

The question, however, is what types of activity are necessary to fulfill this duty. The duty, we submit, necessarily differs depending upon the degree of control the public entity normally exercises over the admission and attendance patterns of private participants. In all instances, the ultimate constitutional requirement is to take affirmative action to create a system that is free from any devices which subtly

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[17] See Pet. App. 181a, 424a n.128; J.A. 147-148. The district court also found that "[i]n working with clubs all agents work across racial lines" (Pet. App. 169a n.53). The United States and private petitioners introduced evidence at trial that the Service had assigned agents to clubs on a racial basis until 1974 (Tr. 1078-1079, 1994-1995). No finding of fact was presented to the district court on this subject, however, and it was presumably for this reason that the court did not specifically address this evidence in its opinion. There is no evidence suggesting that the Service has assigned agents on a racial basis since 1974.

exclude or separate the races. However, the degree of control dictates both the remedial action the governmental entity must undertake to undo the effects of past discrimination and the legitimacy of allowing private actors to determine where they will participate in the government program.

Where, as in public schools, the state traditionally determines if and where the private person will attend, it must engage in "remedial altering of attendance zones" to undo the effects of past discrimination by restoring the condition required by the Constitution, *i.e.*, "truly nondiscriminatory assignments." *Swann* v. *Board of Education*, 402 U.S. 1, 28 (1971). Moreover, if mandatory assignment is the norm, a conversion to a "free choice" scheme that predictably, if not designedly, results in greater segregation is impermissible because such a device only "serve[s] to perpetuate or reestablish the dual school system." *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 460 (1978).

In contrast, where "free choice" is the norm, there are no compulsory discriminatory attendance patterns to redraw in order to undo the effects of past discrimination. Nor is the governmental actor constitutionally required to alter fundamentally the traditional scope and nature of its program by eliminating or restricting participants' free choice. When such private choice is the norm, continuation of such a regime is clearly not a device that fosters segregation and any racial imbalance that results is solely attributable to private actors.

Thus, properly understood, *Green* does not stand for a general proposition that private actors must be deprived of their traditionally unfettered choice unless racial balance results, it simply applies the

familiar rule that a non-unitary system may not engage in activities that foster segregation.[18]

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed in part, affirmed in part, and remanded.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1986

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[18] Thus, respondents have fully complied with the U.S.D.A. Title VI regulation requiring them to "take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. 15.3(b)(6)(i). For the reasons stated above and in our initial brief (*e.g.*, U.S. Br. 38-39 n.41), a covered entity has fully eliminated the effects of past discrimination in the voluntary context when it has engaged in affirmative action to ensure that its program is open to all on an equal basis and that it avoids subsequent segregative conduct. These regulations do not in any way contemplate, as private petitioners suggest, that covered entities are required to restrict the choice of participants through, for example, merger of clubs in order to achieve a particular racial mix.

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BRIEF

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Nos. 85-93 & 85-428

IN THE

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OCTOBER TERM, 1985

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v.

WILLIAM C. FRIDAY, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INDUSTRIAL UNION DEPARTMENT, AFL-CIO AS AMICI CURIAE SUPPORTING PETITIONERS

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This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the Industrial Union Department AFL-CIO ("IUD") with the consent of the parties. The AFL-CIO is a federation of 95 national and inter-

national unions having a total membership of over 13,000,000 working men and women. The IUD is composed of 54 national and international unions having a total membership of approximately 5,000,000 industrial workers.

ARGUMENT

Introduction and Summary

Amici submit this brief for the sole purpose of addressing the question presented by the United States *et al.*, which is also encompassed in the first question presented by Bazemore *et al.* That question is stated by the United States as follows:

> Whether black state employees establish a claim under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), by identifying current salary disparities between themselves and white employees holding the same jobs, when such disparities result from a state policy before 1965 of paying blacks lower salaries than whites. [United States' Petition for Certiorari, p. I.] [1]

In addressing this question, we do not enter the vigorous controversy over whether this question is properly presented on this record. See, *e.g.*, Respondents' Brief in Opposition To the Petition of the United States, pp. 6-16. Instead, we assume that the record (and the findings below, insofar as the record evidence is conflicting) establish the following, which we understand to be the factual

[1] The first question in the *Bazemore* petition is stated as follows:

> Did the court of appeals err in holding that it is both legal and constitutional for a state to intentionally pay black employees less than white employees in the same job, so long as the original decision establishing that discriminatory wage differential was not itself the subject of a timely charge or action. [Petition for Certiorari in No. 85-93, p. i.]

Because we believe the court below erred in its resolution of this Title VII issue, we do not address the constitutional issue raised in the *Bazemore* petition.

predicates for the United States petition's question presented:

1. It was the employer's stated policy and practice, prior to 1965, to pay newly-hired blacks lower initial salaries than those paid whites hired at the same time to do the same job.
2. Within the relevant time period (here, following Congress' extension of Title VII to public employers in 1972), the employer has continued to pay blacks hired prior to 1965 less than whites hired at the same time for doing the same job.
3. That continuing disparity is not due to the intervention of neutral considerations such as a change in the employees' respective job duties, but rather, reflects that the employer simply is presently unwilling to incur the additional cost that would result from paying the blacks at the same level as the whites doing the same job.[2]

On these facts, we believe it is clear that the employer has committed a present violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Our argument proceeds as follows:

In Part I, we show that an employer who initially created a salary disparity between blacks and whites doing the same job because of their races, and who is presently maintaining that disparity because unwilling to spend the additional money that would be required to pay the blacks as much as the whites, is engaged in a present act of race discrimination. It is irrelevant that the employer

[2] In the instant case, it appears to be common ground that current salaries are determined, at least in part, by decisionmakers in each of 100 counties, so that blacks *and* whites holding the same job are paid differently in different counties. For analytical purposes, we have isolated the paradigmatic case; *viz.*, one in which blacks are currently paid less than whites holding the same job in the same county. We have done so because as the petitioners present the case the current disparaties between blacks and whites are not the product of race-neutral differences in the criteria for salary-determination applied by different counties.

may not presently possess the racial hostility that fueled the creation of the differential; to pay blacks less than whites doing the same job simply to save money is *itself* a discriminatory purpose.

In Part II, we show that the reliance of the court below on *United Airlines v. Evans*, 431 U.S. 553 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), is misplaced; in neither of those cases was there a current act of differential treatment undertaken with a discriminatory purpose, as there is here.

In Part III, we suggest that alternative approaches advanced by the petitioners for reversal are more difficult than the approach suggested above, and ought not to be reached. The *Bazemore* petitioners' reliance on a "continuing violation" theory—which we assume is aimed at overcoming the fact that the employer no longer has the racial hostility that originally actuated the salary differential—is unnecessary, for as we have shown the employer's present motive is discriminatory; and it is misleading insofar as it focuses attention on the mere fact of continuity of employment practice rather than on the present basis for that practice. And the United States' reliance on an analogy to the treatment of racially motivated seniority systems should not be considered, because it would unnecessarily require this Court to decide a difficult, unrelated legal issue simply to determine that the analogy is apt, *viz.* whether the limitations principle announced for the NLRA in *Machinists Lodge v. Labor Board*, 362 U.S. 411 (1960), is, as the United States implicitly assumes, inapplicable to Title VII.

I

Plaintiffs' claim in this case is that the employer is intentionally discriminating against black employees in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). That section makes it unlawful for an employer to "discriminate against any individual with

respect to his compensation . . . *because of such individual's race* . . . ." And, of course, to be actionable such discrimination must have occurred within the limitations period established by Title VII, which requires would-be-plaintiffs to file a charge with the Equal Employment Opportunity Commission "within one hundred and eighty days after the alleged unlawful employment practice occurred," § 706(e), 42 U.S.C. § 2000-5(e). Given that limitations period, "the critical question is whether any *present* violation exists," *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977) (emphasis added)—whether *at present* (*i.e.*, within 180 days of the filing of the charge) the employer is treating blacks differently than whites "because of" their race.

In the instant case, on the facts we set out at p. 3, *supra*, there is no question that blacks are presently being paid less than whites doing the same job. The determinative question, therefore, is whether race is the *reason* that presently accounts for that differential or whether the employer is acting on race-neutral grounds in fixing the compensation of his employes.

This Court has made clear that where an employer treats black employees less favorably than white employees who are in all relevant respects similarly situated, an intent to discriminate on the basis of race can "be inferred from the mere fact of differences in treatment." *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). This is true because "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting," and therefore "when all legitimate reasons" for differentiating between employees "have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

In this case, on the facts we have assumed to be established, plaintiffs have shown the type of "difference in treatment" from which it may be inferred that the employer is presently discriminating on the basis of race: plaintiffs have proved that black employees who were hired at the same time as whites presently are being paid less than those whites for performing the same jobs. Moreover, plaintiffs have proved that the pay differential between blacks and whites was *originally* created, prior to 1965, because of race,[3] and that there have been no intervening "neutral" factors (such as changes in the employees' respective job duties) that explain the existence of the differential at present. Unless rebutted, this evidence would provide the most compelling basis for concluding that it is their race that currently explains why blacks are being paid less than whites.

The employer, however, has demonstrated (we have assumed) that the racial animus that initially prompted the salary differential—the blind hostility toward blacks as blacks—no longer obtains, and that the differential has been maintained by the employer out of concern for the "prohibitively costly budgetary alterations," Pet. App. 121a-122a, that would be required to pay blacks hired prior to 1965 the same salary as is paid to whites hired prior to 1965 for doing the same job. But this change in the employer's *reason* for treating blacks and whites differently does not lead to a change in the legal result: *paying blacks less than comparably situated whites in*

[3] Plaintiffs of course were entitled to introduce evidence showing that the employer had a dual salary scale for black and white hires prior to 1965. This Court has made clear that evidence of a "discriminatory act which occurred before the statute was passed . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *United Air Lines v. Evans, supra,* 431 U.S. at 558.

order to save money is itself a present act of discrimination on the basis of race.[4]

The financial burden of paying blacks the same as whites is no more a "neutral" explanation for continuing an existing pay disparity than it would be for creating a new one by paying blacks hired today less than similarly-situated whites hired today. It may well be that social forces make it possible to attract or retain black employees at lower salaries than whites (because, for example, blacks have fewer job opportunities elsewhere), but that surely cannot serve as a justification for paying blacks less than whites to do the same job. To permit such a defense would render Title VII's ban on compensation discrimination a nullity. This Court noted in *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 716-717 (1978), that "neither Congress nor the courts have recognized" a "cost-justification defense" under Title VII to liability for deliberately treating women less favorably than men. The same surely is true as to race discrimination.[5] See also, *Corning Glass Works*

[4] Because the consideration in text is dispositive, we relegate to a footnote the observation that in the context of this case a professed concern for "prohibitively costly budgetary alterations" can not survive scrutiny. The employer has not held the salaries of its employees constant but has instead periodically raised those salaries. The employer has thus chosen to increase the salaries of white employees rather than aplying those same revenues to raising blacks' salaries to the level of the whites'. And if the response is that the employer feared whites would quit unless furnished those increases, whereas equalization was not necessary to induce blacks to remain, that is merely confirmation that present social conditions enable the employer to discriminate on the basis of race.

[5] As this Court has established, the fact that an employer may have been actuated not by racial or gender-based hostility but by self-interest or even by some altruistic consideration is not a defense under § 703(a)(1) to treating blacks differently from whites or men or women. See, for example, *Arizona Governing Committee v. Norris,* 463 U.S. 1073, 1083-85 (1983); *Manhart,* 435 U.S. at 709.

v. Brennan, 417 U.S. 188, 205 (1974) (Congress did not intend the availability of women at lower wages to constitute a justification for paying unequal wages for equal work under the Equal Pay Act.) Thus, the employer's invocation of budgetary considerations is not a non-discriminatory basis for the pay differential; it is merely an explanation of why the employer is presently discriminating on the basis of race.[6]

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[6] While the analysis in text is sufficient to dispose of the instant case, we wish to note our disagreement with the suggestion in the United States petition (at p. 18, n.20) that pay discrimination under Title VII cannot be proved circumstantially from the fact that blacks are paid less than comparably situated whites but can be proved only by some more direct form of evidence of discriminatory intent. Such a notion conflicts with the uniform approach of this Court.

As this Court has recognized, "[t]here will seldom be 'eyewitness' testimony" as to the employer's basis for differentiating between employees. *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983). Consequently, "[a]s in any lawsuit, the [Title VII] plaintiff may prove his case by direct or circumstantial evidence," and the courts are to "consider all the evidence, giving it whatever weight and credence it deserves"; indeed it is error to require a Title VII plaintiff to submit direct evidence of discriminatory intent because it is a "general principle that any Title VII plaintiff [may] carry the initial burden of offering evidence adequate to create an *inference* that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters v. United States, supra*, 431 U.S. at 358 (emphasis added.)

This lesson is fully applicable in the context of claims of discrimination in compensation. Where blacks show that they are paid less than similarly-situated whites, and negate "the most common non-discriminatory reasons" for the differential, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), that proof raises an inference of discrimination for the very reason such inferences have been drawn in other Title VII cases: that discrimination between comparably-situated blacks and whites, "if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters, supra*, 438 U.S. at 577. In such a case, if the employer proffers no innocent explanation for the differential, or proffers an explanation that is found to be pretextual, the plaintiff is entitled to prevail. *Burdine*, 450 U.S. at 254; *Aikens*, 460 U.S. at 714. It is our view, accordingly, that plaintiffs could have prevailed in the instant case even had they not introduced evidence of the pre-1965 discriminatory salary practices (assuming the facts to be those we set out at p. 3, *supra*, in all other respects).

II

The court below believed that this Court's holdings in *United Air Lines v. Evans, supra*, and *Hazelwood School District v. United States*, 433 U.S. 299 (1977) compel the conclusion that Title VII does not render the current wage disparity between whites and blacks unlawful. That belief is erroneous.

In *Evans*, the Court held that an employer did not violate Title VII by applying to the respondent employee its uniform rule—regularly applied to men and women alike—that employees who are discharged and later rehired are treated as new employees for all purposes and accorded no credit for their prior service. The plaintiff contended that the rule was discriminatory as applied to her, because her discharge several years before had been discriminatorily motivated. This Court held that a challenge to the discharge was time-barred, and accordingly the discharge was "an unfortunate event in history which has no present legal consequences," 431 U.S. at 558. Plaintiff's status thus was no different than that of any other employee discharged and later rehired. And plaintiff did not allege, let lone prove, that the employer discriminated on the basis of sex as between such employees:

> Nothing alleged in the complaint indicates that United's seniority system treats existing female employees differently from existing male employees, or that the failure to credit prior service differentiates in any way between prior service by males and prior service by females. Respondent has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex. [*Id.* at 557-558.]

By contrast, the claim in the instant case is precisely that the employer's current pay practice "treats existing [black] employees differently from existing [white] employees" and "differentiates between similarly situated [blacks and whites] on the basis of [race]." Here, plaintiffs do not seek to infuse a facially neutral practice, not itself unlawful, with illegality by reference to a time-barred or pre-Act wrong. Rather here, the present practice under attack—paying black employees less than white employees doing the same job—is not "neutral in its operation," *id.* at 558, and plaintiffs have shown that the employer has maintained this race-skewed differential with discriminatory intent (pp. 6-7, *supra*).

In *Hazelwood*, the issue was whether the employer, a public school district, had engaged in a pattern or practice *of* race discrimination in the hiring decisions made after Title VII became applicable to public employers. The plaintiff sought to establish such a pattern or practice by introducing statistics showing that the present racial composition of the employer's workforce did not reflect the racial composition of the workforce from which the employer hired. In the passage of the *Hazelwood* opinion that the court below thought significant for the instant case, this Court discussed the weight to be accorded such evidence:

> The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. *A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.* For this reason, the Court cautioned in the *Teamsters* opinion that once a prima facie case has been established by statistical workforce disparities,

> the employer must be given an opportunity to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination." 431 U.S., at 360. [453 U.S. at 309-310, emphasis added, footnote omitted.]

The court below believed that the sentence in *Hazelwood* italicized above (quoted, 751 F.2d at 760) dictated the resolution of this case. But the difference between that case and this is self-evident. An employer who had followed a discriminatory hiring policy prior to Title VII's effective date and who embarked on a nondiscriminatory hiring policy on that date would have done nothing that could constitute a violation of Title VII. In contrast, the employer in the instant case has, subsequent to the effective date of the Act, repeatedly paid blacks less than similarly-situated whites for performing the same work—indeed, has done so every payday. What is more, the employer in the instant case has periodically reevaluated and adjusted its payscale subsequent to the effective date of the Act, and each time, without having any nondiscriminatory reason for so doing, has settled upon a payscale that contains a disparity between black's wages and the wages of whites doing the same job. And, as shown, the basis for that current disparity is the race of the employees. Thus, unlike the hypothesized employer in *Hazelwood* whose current practices were "wholly nondiscriminatory," the practice of the employer here is not. And it is this current, discriminatory practice that is at issue here.

III

What we have said to this point represents, we believe, the proper analytical approach to the disposition of the question presented. Petitioners have advanced alternative approaches that we believe do not provide a sound basis for resolving that question.

A. The *Bazemore* petitioners have analyzed the question in terms of whether there is here a "continuing" violation (*Bazemore* Pet. at 17-24). We believe that label misfocuses analysis, and should be avoided.

Plaintiffs' effort has been undertaken, we assume, to counter the employer's claim that while the pay differential was originally created for reasons of racial animus, the differential has been maintained in the relevant time period for "economic" reasons, *i.e.*, the financial burden of paying blacks and whites the same salaries. As we have shown, pp. 6-7, *supra*, the current practice is illegal if that is the employer's rationale, for even on that rationale the employer is presently treating blacks differently than similarly situated whites because of their race. If, however, the employee had a *lawful* basis, unrelated to race, for the current pay differential, there would not be a violation simply because the practice (as distinct from the motive actuating it) was "continuing." Consequently, "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *United Air Lines v. Evans*, *supra*, 431 U.S. at 558 (emphasis in original).[7]

B. The United States has suggested that the correct answer to this case can be derived by analogy to the

[7] If an employer is found to have engaged in a present violation, at the remedy stage of the case it may become necessary to determine whether that violation is "continuing." This is because of the conjunction of section 703(e), which requires that a Title VII charge be filed within 180 days of the act complained of, and section 706(g), which authorizes an award of backpay for two years prior to the filing of the charge. It is unlikely that Congress intended that if *one* wrongful act is timely challenged the employee can recover backpay for *unrelated* wrongs committed by the employer that were not themselves the subpect of a timely change. If, as seems likelier, Congress intended to provide a remedy for acts prior to the relevant time period only for earlier injuries resulting from a course of conduct that continued into the relevant time period, it becomes necessary for that purpose to distinguish between violations that have been "continuing" and those that have not. Indeed, in a disparate pay case such as that presented here, once it is determined that a current (*i.e.*, timely challenged) violation has been committed, the *Bazemore* petitioners' analysis would surely demonstrate that backpay is authorized for two years prior to the filing of the charge.

treatment of "intentionally discriminatory seniority system[s]":

> [J]ust as an intentionally discriminatory seniority system, even one that was adopted before the Act became effective, is unlawful (*Pullman-Standard v. Swint*, 456 U.S. 273, 276-277 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76 (1982)), so that it affords no justification for current employment practices that have a race-based effect, so the courts of appeals have correctly recognized that an intentionally discriminatory pre-Act salary system affords no justification for current salary practices that have a race-based effect [U.S. Pet. at 18].

But the two practices that the United States would compare are conceptually different, and require different analyses for their resolution; indeed, the seniority case is by far the harder of the two and, contrary to the assertion of the United States, it has not been resolved by this Court.

The cases cited by the United States stand for the proposition that discriminatorily motivated seniority systems do not enjoy the protection accorded by § 703(h) to bona fide seniority systems. And in *Swint*, the Court addressed on its merits, without suggesting that there might be a timeliness problem, a claim that a seniority system was unlawful because allegedly negotiated in 1954 with discriminatory intent. But the question whether such systems are indefinitely subject to challenge was not presented in those cases, for no challenge to the timeliness of the plaintiffs' claims was asserted. And resolution of that timeliness question turns upon a consideration not present in the instant case: whether a practice that is *neutral* on its face, and that is not shown to have been *maintained* in the relevant time period for discriminatory reasons, may be challenged *solely* on the ground that the practice was initially *adopted* (in a time-barred period) with discriminatory motive. This Court

has not addressed that question under Title VII, but the identical question has been answered by this Court under the National Labor Relations Act in a manner contrary to the United States' position.

In *Machinists Local v. Labor Board*, 362 U.S. 411 (1960), the Court addressed the timeliness of a challenge to the maintenance of a collective bargaining agreement that was alleged to be unlawful because adopted at a time when the union did not represent a majority of the employees. Under existing Board law, which the Court assumed to be correct, "the continued enforcement, as well as the execution of this collective bargaining agreement constituted an unfair labor practice, and . . . these are two logically separate violations, independent in the sense that they can be described in discrete terms." 362 U.S. at 422. Nevertheless, the Court held that in light of the NLRA's six-month time limit for filing charges (Section 10(b), 29 U.S.C. § 160(b)), "the enforcement . . . of such an agreement as this constitutes a *suable* unfair labor practice only for six months following the making of the agreement." 362 U.S. at 423 (emphasis in Court's opinion.)[8] The Court, noting that a contrary holding "would mean that the statute of limitations would never run in a case of this kind," *id.* at 416, reasoned as follows:

> Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," . . . and of course to stabilize existing bargaining relationships. [*Id.* at 419, footnote omitted.][9]

[8] See also, *id.* at 422: "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso" (emphasis added, footnote omitted). The Court also held, of course, that the *execution* of the agreement could be challenged as an unfair labor practice only within six months of the date of execution, *id.* at 415, 419.

The *Machinists Local* Court was careful to distinguish the case at hand from two hypothetical cases:

> [T]he vice in the enforcement of this agreement is not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validity executed but unlawfully administered. [*Id.* at 423.]

The instant case involves a pay practice that is "invalid on its face," and that is being maintained currently for a reason that is not permissible under Title VII. There is thus no occasion here to decide whether the analysis of *Machinists Local* is applicable under Title VII, or whether the contrary analysis implicit in the government's attempted analogy should apply under Title VII.

[9] In *Machinists Local*, the agreement was executed subsequent to the enactment of the NLRA. We assume, however, that the Court would have held a challenge to the post-Act enforcement of an agreement executed with a minority union prior to the effective date of the Act to be actionable if filed within six months of the Act's effective date. For like reasons, if the holding of *Machinists Local* were applicable to Title VII, we assume that facially neutral seniority systems negotiated with discriminatory intent prior to the effective date of Title VII were subject to challenge promptly—within the length of the limitations period—after Title VII became effective.

CONCLUSION

For the reasons set forth above, the decision below on the question presented by the United States petitioners and the first question presented by the *Bazemore* petitioners should be reversed.

Respectfully submitted,

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AMICUS CURIAE

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P. E. BAZEMORE, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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D. Baldus and J. Cole, *Statistical Proof of Discrimination* (1980 & Supp. 1985) 11
D. Bloom and M. Killingsworth, *Pay Discrimination Research and Litigation: The Use of Regression*, 21 Indus. Rel. L. J. 318 (1983) 11
T. Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299 (1984) 12, 13
M. Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737 (1980) 15
F. Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702 (1980) 11, 12
Note, *Title VII, Multiple Linear Regression Models, and the Courts: An Analysis*, 46 Law & Contemp. Probs. 283 (1983) 15
B. Schlei and P. Grossman, *Employment Discrimination Law* (BNA) (2d ed. 1983 & Supp. 1983-84) 21, 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-93 and 85-428

P. E. BAZEMORE, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae. The

parties' written consents to file this brief have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are committed firmly to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to various equal employment laws, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* EEAC's members maintain wage and salary schedules that comply with Title VII's non-discrimination requirements. Thus, EEAC has a direct interest in one of the issues presented for the Court's consideration in the instant case—whether a district court properly may dismiss allegations of a pattern or practice of disparate treatment which are based on multiple regression analyses that fail to account for relevant variables that are likely to affect salary determinations. EEAC takes no position regarding whether the plaintiffs in the instant case established a timely claim under Title VII for current wage disparities that result from pre-Act discrimination, but rather limits its discussion herein to the issue of the appropriate burdens of proof in cases involving the use of multiple regression analyses.

Because of its interest in the issues of statistical proof of discrimination under Title VII, and the relative burdens required of plaintiffs and defendants thereunder, EEAC has filed amicus curiae briefs with this Court in numerous cases involving the interpretation of that Act, including *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *Connecticut v. Teal*, 457 U.S. 440 (1982).

STATEMENT OF THE CASE

Bazemore and more than fifty other employees ("Bazemore" or "plaintiffs") sued officials of the North Carolina Agricultural Extension Service ("NCAES" or "defendants"), alleging a pattern or practice of intentional race discrimination. Before 1965, NCAES agents, who provide agricultural and other educational services to state residents, were divided racially into separate branches. Prior to 1965, NCAES had paid black agents serving black constituents a lower salary than white agents in a similar capacity.

NCAES eliminated these separate branches in 1965, shortly after the effective date of Title VII, by merging the two branches into a single organization.

NCAES attempted to eliminate pre-Act salary disparities by, for example, setting uniform minimum starting salaries for all agents. Wage disparities, however, had not been entirely eliminated when this suit was filed in 1971, or in 1972 when Title VII was amended to require compliance by state agencies.

At trial, the Justice Department, as intervenor, introduced multiple regression analyses comparing the salaries of black and white agents for the years 1974, 1975 and 1981. These regression analyses, which controlled for four variables allegedly determinative of salary (race, education, tenure and job title), suggested statistically significant racial effects in 1974 and 1975, but not 1981. These regressions did not control for across-the-board and percentage pay increases. NCAES introduced regressions which also added quartile rank, a measure of job performance, yielding statistically significant disparities in 1975, but not 1981.

The district court ruled in favor of NCAES on all counts. First, the court ruled that a pre-Act difference in salaries need not be affirmatively eliminated. In addition, the district court rejected the Justice Department's regression analyses as flawed because the regressions failed to account for a number of relevant variables, including across-the-board and percentage pay increases. The court concluded that while the plaintiffs had "probably made out a prima facie case with respect to defendants' promotion and salary practices," the defendant "articulat[ed] plausible reasons for its actions . . . which the court found convincing." Pet. App. 190a.[1]

[1] "Pet. App." refers to the appendix filed with the petition in No. 85-93. "Justice Br." refers to the Brief for the Federal Petitioners. "NAACP Br." refers to the Brief for the Petitioners, NAACP Legal Defense & Educational Fund, Inc. "NCAES Br." refers to the Brief for the Respondents, William C. Friday, *et al.*

The panel majority of the Fourth Circuit affirmed, holding that while discrimination existed before the enactment of Title VII, the law does not require that a "pre-Act discriminatory difference in salaries [. . . be] affirmatively eliminated." *Bazemore v. Friday*, 751 F.2d 662, 670 (4th Cir. 1984). Similarly, the appeals court affirmed the district court's rejection of the plaintiffs' regression analysis because the figures analyzed "reflect the effect of pre-Act discrimination" and fail to include "variables which ought to be reasonably viewed as determinants of salary." *Id.* at 672. Judge Phillips dissented in part, reasoning that salary differentials continued "until at least 1976," and that the statistical analyses were "wholly consistent" in showing a substantial race-based disparity. *Id.* at 693, 694.

SUMMARY OF ARGUMENT

The Fourth Circuit properly imposed upon the plaintiffs the burden, in their prima facie case, to account for those variables reasonably viewed as determinants of salary. This Court should affirm that standard, and also should require a plaintiff to prove several specific elements, as part of its prima facie case, when attempting to use a multiple regression analysis to show a pattern or practice of disparate treatment.

First, a plaintiff should be required to account for the variables relevant to an employer's salary deter-

mination, a requirement met by initially ensuring that the theoretical foundation of its regression analysis "fits" the particular facts of the case. Thus, a plaintiff's regression analysis should include relevant objective and quantifiable variables that are likely to affect salary determinations. Second, if a variable is truly unquantifiable, the plaintiff should be required at a minimum to substitute a suitable "proxy" for the relevant variable, or account for the variable through other evidence. In addition, a plaintiff should not be excused from the duty to account for a variable merely because it is arguably "tainted," or allegedly masks an employer's discrimination, since the resolution of whether the variable is in fact tainted is a question of fact to be decided by the trial court. Also, a plaintiff's regression normally should focus upon employment decisions made during the relevant time period.

Legal and logical considerations favor adherence to this standard. First, it is consistent with the plaintiff's customary burden in a disparate treatment case to establish an employer's discriminatory intent. Imposition of this burden is particularly important in a pattern or practice case, since a plaintiff under that theory at all times maintains the responsibility for proving by a preponderance of the evidence that race discrimination "was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. Finally, such burden is not onerous, but rather merely requires the plaintiff to eliminate the most likely nondiscriminatory reasons for any observed disparity in

order to establish a prima facie case of discrimination.

The Fourth Circuit also applied the proper burden of proof standards in finding that, even if the plaintiffs established their prima facie case, the defendants rebutted it. The appropriate rebuttal standard, as conceded by both plaintiffs herein, requires a defendant *only* to articulate or "raise[] a genuine issue of fact as to whether it discriminated against the plaintiff," not to "persuade the court that it was actually motivated by the proffered reasons." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254-55. This rebuttal standard, requiring a defendant only to show that a plaintiff's regression is flawed in its assumptions, data or analysis, is especially important in a case involving a pattern or practice of disparate treatment. Of course, this articulation must be "clear and reasonably specific," and must have some basis in the facts as developed in discovery or otherwise, but a defendant clearly is not required to disprove a plaintiff's case. Finally, as this and other courts have noted, this standard is appropriate since the defendant usually will attempt to show at rebuttal that its practices were lawful, and since liberal discovery rules permit a plaintiff access to the relevant information needed to establish its case.

ARGUMENT

THE COURT OF APPEALS PROPERLY ALLOCATED THE BURDENS OF PROOF IN THIS DISPARATE TREATMENT PATTERN OR PRACTICE CASE INVOLVING THE USE OF A MULTIPLE REGRESSION ANALYSIS

The Fourth Circuit below rejected the plaintiffs' statistical proof because it believed that the plaintiffs failed to establish a prima facie case of intentional discrimination, and found that the defendants would have rebutted any inference of discrimination. In doing so, the court established appropriate burdens of proof for both plaintiffs and defendants in a pattern or practice disparate treatment case where multiple regression analyses are used.[2]

While this case involves the use of a number of complicated statistical analyses, including multiple regression analyses, it is at bottom a relatively simple burden of proof case, in which the parties' respective burdens are defined clearly under previous decisions of this Court. In fact, all parties herein agree that the defendant's burden in such cases is that laid out by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *See* NAACP Br. at 53; Justice Br. at 25 n.23.

All parties concede, and the courts below properly viewed this case to be a disparate treatment case. Dis-

[2] EEAC takes no position on whether the plaintiffs in this case established a timely claim under Title VII for current wage disparities that result from pre-Act discrimination. Rather, EEAC's brief is limited to a discussion of the proper burdens of proof in a class action or pattern or practice case involving the use of multiple regression analyses.

parate treatment is concerned with those situations where an employer "simply treats some people less favorably than others *because of* their race, color, religion, sex, or national origin." *Teamsters*, 431 U.S. at 335 n.15 (emphasis added). Proof of discriminatory motive is the central inquiry. *Id.* To establish discriminatory motive in a disparate treatment case, this Court has required a three-part order and allocation of proof. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Briefly, a plaintiff may establish a prima facie case by producing evidence "adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters*, 431 U.S. at 358, and by "eliminating the most common nondiscriminatory reasons for the employer's actions." *Burdine*, 450 U.S. at 255.[3] A plaintiff carries the burden of showing "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is *more likely than not* that such actions were 'based on a discriminatory criterion illegal under the Act.'" *Furnco*, 438 U.S. at 576, citing *McDonnell Douglas* (emphasis added).

[3] *McDonnell Douglas* permits the plaintiff to establish a prima facie case by showing "(i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802. The four *McDonnell Douglas* requirements, however, are not an inflexible formula, but "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The defendant then must "articulate," or come forward with, evidence of "some legitimate, nondiscriminatory reason" for its actions, *McDonnell Douglas*, 411 U.S. at 802, or "provide a nondiscriminatory explanation for the apparently discriminatory result." *Teamsters*, 431 U.S. at 360 n.46. If the defendant carries this burden, the plaintiff has the opportunity to show that the proffered reasons are "pretextual," that they were not the true reasons for the employer's action, and that the true reasons were discriminatory. *McDonnell Douglas*, 411 U.S. at 804-05. The burden of proof remains at all times with the plaintiff. *Burdine*, 450 U.S. 248. As detailed below, these basic principles are fully and readily applicable to pattern or practice cases involving the use of multiple regression analyses.

I. To Establish A Prima Facie Case Of An Employer's Pattern Or Practice Of Disparate Treatment, A Plaintiff's Multiple Regression Analysis Must Account For Variables Reasonably Viewed As Determinants Of Salary

This Court has recognized that "statistics can be an important source of proof in employment discrimination cases." *Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977). In fact, statistics generally, and multiple regressions specifically, often play an important role in proving a pattern or practice of discrimination. This Court has recognized, however, that statistical proof's "usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340. It is precisely "[b]ecause of the significant role that statistics can play in discrimination cases" and because of their "inherently slippery nature" that "it is imperative that they be used properly." *Wilkins v. University of Houston*, 654 F.2d 388, 395 (5th Cir.), *vacated and remanded on other grounds*, 459 U.S. 822, *aff'd on remand*, 695 F.2d 134 (5th Cir. 1983); *see also EEOC v. Federal Reserve Bank*, 698 F.2d 633, 645 (4th Cir. 1983), *rev'd and remanded on other grounds sub nom., Cooper v. Federal Reserve Bank*, —— U.S. ——, 104 S.Ct. 2794 (1984).

Multiple regression is a 'relatively sophisticated means of determining effects that any number of different factors have upon a particular variable." *Wilkins*, 654 F.2d at 402-03.[4] Thus, the "validity of the [regression] and the significance of its results" must be examined, *id.* at 403, to determine the " 'ex-

[4] A multiple regression analysis is concerned with the effect that various independent variables (such as race, sex, seniority or education) might have on a dependent variable (such as salary). In other words, a regression analysis, in appropriate cases, can help determine to what extent race may have been a factor in the salary received by certain employees. Thus, the purpose of a regression analysis regarding alleged pay discrimination on the basis of race "is to determine whether a [racial] difference in pay persists when one factors out the possible effects of other variables." D. Bloom and M. Killingsworth, *Pay Discrimination Research and Litigation: The Use of Regression*, 21 Indus. Rel. L.J. 318, 321 (1983). With a multiple regression, "one first specifies the major variables that are believed to influence the dependent [salary] variable." F. Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705 (1980). "The relationship between the dependent variable and the independent variable of interest is then estimated by extracting the effects of the other major variables. . . ." *Id.* at 706. Those results "can be read as showing the effects of each variable on the dependent variable, holding the others constant. Moreover, those results allow one to make statements about the probability that the effect described has merely been observed as a result of chance fluctuation." *Id.*; *see* D. Baldus and J. Cole, *Statistical Proof of Discrimination* § 8.022[1] (1980 & Supp. 1985).

istence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn,'" *Federal Reserve Bank*, 698 F.2d at 645, *quoting White v. City of San Diego*, 605 F.2d 455, 460 (9th Cir. 1979). The Fourth Circuit properly stated *generally* that a plaintiff's regression must account for variables reasonably viewed as determinants of salary, but it is imperative to delineate several *specific* elements of that standard which this Court should require for a plaintiff's regression analysis to establish a prima facie case of a pattern or practice of disparate treatment.

A. A Plaintiff Has The Burden To Account For Relevant Variables

1. *The Plaintiff's Regression Must Include The Relevant Objective And Quantifiable Factors Actually Used By The Employer To Make Salary Determinations*

The specific elements of the general standard outlined by the Fourth Circuit flow logically from that standard. First, a plaintiff must relate the theoretical foundation of its regression analysis (in this case, the variables believed to influence salary) to the method *actually used* by the employer to make the decisions under scrutiny. This requirement is often referred to by statisticians as "goodness of fit." *See, e.g., EEOC v. Sears, Roebuck & Co.*, C.A. No. 79C 4373 (E.D. Ill. Jan. 31, 1986), *reprinted in* Daily Labor Report (BNA) D-1, D-6 (Feb. 6, 1986); Baldus and Cole § 8.2; T. Campbell, *Regression Analysis In Title VII Cases: Minimum Standards, Comparable Worth and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299, 1303 (1984); Fisher at 716.

The statistical "model must be hypothesized to link the influences with the outcome," Campbell at 1302, a hypothesis that usually is formed during discovery, and which yields potential explanatory variables that are believed to affect salary. *See Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir. 1983), *cert. denied sub nom., James v. Tennessee Valley Authority*, 465 U.S. 1066 (1984); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 (4th Cir. 1980); *Penk v. Oregon State Board of Higher Educ.*, C.A. No. 80-436, slip. op at 379-380 (D. Or. Feb. 13, 1985).[5] These variables in the instant case, as recognized by the Fourth Circuit, include education, tenure, job title, work performance and county-by-county disparities. *Bazemore v. Friday*, 751 F.2d 662, 672 (4th Cir. 1984).

The burden to construct a theoretical model that "fits" places the concomitant burden upon a plaintiff to include in its regression those objective and quantifiable variables *relevant* in actually determining wages. *EEOC v. Sears* at D-6 & n.8. Many courts have imposed this relevance requirement, and have examined closely those factors included or omitted from a plaintiff's regression. For example, the court

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[5] The failure to establish a theoretical foundation represents a significant problem for plaintiffs attempting to use a regression analysis to establish a prima facie case. In fact, one commentator in 1984 noted that "in only eight reported cases has the opinion reflected any attempt to measure whether the model was appropriate for the data." Campbell at 1306-07. The commentator also noted that "evidence of the model's appropriateness and the closeness of its fit may have been introduced at trial [in other cases] but not included in the opinion. If so, judges are not exhibiting adequate concern for a fundamental aspect of statistical proof, important upon appellate review." Campbell at 1307 n.22.

in *EEOC v. International Business Machines Corp.*, 583 F. Supp. 875, 906 (D. Md. 1984), found that the plaintiff's omission of relevant factors such as seniority, job level and class groupings rendered the results of its multiple regression analysis "useless." The court in *Tolliver v. Yeargan*, 567 F. Supp. 116 (S.D. Ark. 1983); *aff'd*, 728 F.2d 1076 (8th Cir. 1984), also held that the plaintiff had not established a prima facie case in part because its regression failed to account for school-by-school differences in salary. Another court found that the plaintiff's regression was "rife with methodological and analytical flaws, and therefore is not credible," partly because the analysis failed to account for the defendant's across-the-board percentage increases, as well as discretionary or merit increases. *Coser v. Moore*, 587 F.Supp. 572, 599 (E.D.N.Y. 1983), *aff'd*, 739 F.2d 746 (2d Cir. 1984).[6]

It is clear, therefore, that a plaintiff does not establish its prima facie case when it relies solely upon a regression analysis that does not account for

[6] *See also EEOC v. Sears* at D-37 (failure to account for, *inter alia*, job performance and the employer's decentralized decision-making made plaintiff's statistics "so flawed that they lack any persuasive value"); *EEOC v. Hartford Fire Insurance Co.*, 31 FEP Cases 531, 545 (D.D.C. 1983) (failure to account for several relevant variables which might have influenced an employee's salary, including age, employment experience, work performance and tenure); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 803 (5th Cir. 1982); *Sobel v. Yeshiva University*, 566 F. Supp. 1166 (S.D.N.Y. 1983) (failure to control for rank); *Eastland*, 704 F.2d at 623 (failure to control for job category casts doubt on regression); *Valentino v. United States*, 511 F. Supp. 917, 945 (D.D.C. 1981), *aff'd* 674 F.2d 56 (D.C. Cir. 1982); *Agarwal v. Arthur G. McKee & Co.*, 19 FEP Cases 503 (N.D. Cal. 1977), *aff'd*, 644 F.2d 803 (9th Cir. 1981).

relevant objective and quantifiable variables. Moreover, to shift the burden of persuasion to the defendant based upon a poorly fitted or incomplete regression would violate the standards of proof articulated by this Court in *Teamsters* and *Burdine*, as discussed *infra*.

2. *Where The Plaintiff's Regression Does Not Account For Subjective And Unquantifiable Variables, Evidence Regarding These Relevant Variables Must Be Introduced In Some Other Form To Establish A Prima Facie Case*

In some instances, a regression analysis may be unable to account for truly unquantifiable variables, such as job prefereces or motivation. Note, *Title VII, Multiple Linear Regression Models, and the Courts: An Analysis*, 46 Law & Contemp. Probs. 282, 286-7 (1983); *See* M. Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737, 742 (1980). It is obvious, however, that employers do, in fact, make employment decisions based upon unquantifiable differences between employees (job performance, in many instances), a practice that is "permissible and necessary under Title VII." *Penk*, slip op. at 387; *see also EEOC v. Sears* at D-38. These unquantifiable variables, in fact, may significantly affect the salaries paid to particular employees. It follows, therefore, that a court cannot correctly hold that plaintiffs have established a prima facie case where their regression fails to account for the actual "processes used . . . to make employment decisions." *Penk*, slip op. at 388; *see EEOC v. Sears* at D-38; *Agarwal*, 19 FEP Cases at 506; *Coser*, 587 F. Supp. at 599.

Plaintiffs, certainly, can use non-statistical evidence to account for the actual processes used by an

employer to make the decisions under scrutiny. In fact, a regression may not be an appropriate means by which to infer discrimination from an employer's compensation scheme, if the factors affecting compensation cannot be quantified. *EEOC v. Sears* at D-39. In the situation where a plaintiff fails to account for the factors affecting compensation, either with a regression or with other evidence, the district judge should dismiss the claim for failure to establish a prima facie case.

Plaintiffs will not be unduly hindered by the imposition of this requirement to account for relevant unquantifiable variables. If a plaintiff wishes to use a regression analysis, instead of other relevant evidence, suitable "proxies" sometimes can be used to estimate variables such as "productivity."[7] The court in *Sobel v. Yeshiva University*, 566 F. Supp. 1166 (S.D.N.Y. 1983), for example, substituted rank as a proxy for productivity. In fact, NCAES in the instant case used the quartile ranking system for productivity, a factor which plaintiffs chose not to incorporate into their regression. Of course, a proxy may not represent a relevant variable exactly. Where an appropriate proxy is not available, it is imperative that a plaintiff prove its case with other evidence.

Plaintiffs often object to any requirement that they account for subjective factors which are alleged to be "tainted," or which allegedly mask an employ-

[7] A proxy attempts to measure a variable which seems unquantifiable in its pure form. For example, while a regression analysis can account for productivity in a job where the measurement is widgets produced per hour, it may not be able to measure research quality or student teaching in a university setting. *See, e.g., Penk*, slip op. at 385. The proxy purports to measure the apparently unquantifiable factor by substituting another measurement.

er's discrimination. *See James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 332 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Greenspan v. Automobile Club of Michigan*, 495 F. Supp. 1021, 1064 (E.D. Mich. 1980); *Melani v. Board of Higher Educ.*, 561 F. Supp. 769, 778 (S.D. N.Y. 1983). This objection lacks persuasive appeal, however, since whether a variable is tainted depends upon the district court's ultimate ruling on whether there has been discrimination in the employer's application of that factor. Absent persuasive extrinsic evidence that the variable was in fact "tainted" by unlawful discrimination, the plaintiffs should be required to include such a variable in their regression analysis. *See EEOC v. Sears* at D-41. Allowing the plaintiffs to exclude the variable from their regression merely because they have *alleged* that the factor was applied discriminatorily would presuppose that discrimination occurred. *See Coates v. Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985).

Thus, a plaintiff has the specific burden to include in its regression analysis the relevant factors used by the employer to determine salaries. Seemingly subjective or unquantifiable factors may be represented in the analysis by suitable proxies, but where suitable proxies are not available, unquantifiable factors affecting salary must be taken into account by the production of other evidence of discriminatory intent. Plaintiffs also must account for evidence that is arguably tainted unless plaintiffs can prove, with persuasive extrinsic evidence, that the variable actually masks the employer's discrimination. Ultimately, therefore, plaintiffs must account for the factors used

by the employer to make its decisions, or risk failing to establish a prima facie case.[8]

B. The Requirement That A Plaintiff Using A Regression Analysis Account For Relevant Variables As Part Of Its Prima Facie Case Is Consistent With The Legal Requirements And Logical Basis For Establishing A Pattern Or Practice Of Disparate Treatment

Legal and logical reasons favor imposing upon a plaintiff the burden to establish, at the prima facie case stage, that its statistics account for relevant variables that may have affected salary determinations within the relevant time period. This burden is not overly stringent; rather, it is simply a specific application of the plaintiff's normal burden in a disparate treatment case, which is to establish proof of an employer's "discriminatory motive" or intent. *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, —— U.S. —— (1984); *Penk*, slip op. at 403.

Adherence to this standard is especially important where a plaintiff alleges a *pattern or practice* of disparate treatment, since under that theory a plaintiff must show by a preponderance of the evidence that the alleged discriminatory practice is the "company's standard operating procedure—the regular rather than the unusual practice." *Cooper*, 104 S. Ct. at 2800, *citing Teamsters* at 336. Such a wholesale

[8] While EEAC takes no position regarding whether the plaintiffs in the instant case established a timely claim under Title VII for current wage disparities resulting from pre-Act discrimination, it is important to stress that regression analyses normally should focus on employment decisions made during the relevant time period. *See Valentino*, 511 F. Supp. at 944, 955; *see generally Hazelwood*, 433 U.S. at 309; *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

attack on an employer's standard operating procedure "must be one based upon a specific intent to discriminate against an entire group, to treat it as a group less favorably because of [race]." *EEOC v. International Business Machines Corp.*, 583 F. Supp. at 903, *citing Stastny*, 628 F.2d at 274 n.10. A plaintiff alleging disparate treatment, of course, always bears the prima facie burden to "eliminate[] the most common nondiscriminatory reasons for the employer's action." *Burdine*, 450 U.S. at 254. But where the attack is directed at an employer's entire operating procedure, it is particularly important that the plaintiff's evidence account for variables that might legitimately explain differences in measured results.

This standard has intuitive appeal given the ultimate factual issue before the district court in a case of this type: whether the defendant both *intentionally* and as a *standard operating procedure*, discriminated against the plaintiffs. Thus, it makes little sense to permit a plaintiff to establish its initial burden with statistics that fail to account for the primary factors that are likely to affect salary.

Requiring a plaintiff to account for such factors is entirely reasonable. The Justice Department, a plaintiff herein, has noted that the Fourth Circuit "clearly would have erred if it had held, as private petitioners assert in their Questions Presented, 'that statistics may not be treated as probative evidence of discrimination unless the statistical analysis considers every conceivable non-racial variable.'" Justice Br. at 21. Of course, the court below did not impose this onerous "every conceivable variable" burden on plaintiffs. Rather, as the Justice Department itself acknowledges, "the appellate court articulated

the correct rule, that a plaintiff's statistical analyses in a disparate treatment case must include 'variables which ought to be reasonably viewed as determinants of salary.'" *Id.* This burden is one which properly allocates the relative burdens between plaintiffs and defendants and, with the further requirement that a plaintiff account, either through its regression analysis or otherwise, for relevant variables, will provide adequate guidance to future litigants.

II. A Defendant Need Only Articulate A Nondiscriminatory Reason For Its Conduct By Identifying A Relevant Variable Omitted From Plaintiff's Regression, And Need Not Disprove Plaintiff's Case At Rebuttal

The Fourth Circuit below rejected the plaintiffs' regression analysis because the court determined that plaintiffs failed to establish a prima facie case. *Bazemore*, 751 F.2d at 672. The court went on to find that even "assum[ing] that a prima facie case was made . . . it has been completely refuted [by NCAES]." *Id.* at 687. It is important for the present discussion to examine what the law currently requires a defendant to produce to rebut a plaintiff's prima facie case, and how that theoretical burden should be applied in a regression case.

Once a plaintiff establishes an inference of intentional discrimination by proving a prima facie case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the challenged action, *McDonnell Douglas*, 411 U.S. at 802, or to "provide a nondiscriminatory explanation for the apparently discriminatory result." *Teamsters*, 434 U.S. at 360 n.46; *Burdine*, 450 U.S. at 255. This *Burdine* standard, conceded as applicable by NAACP in its brief at 53 and by the Justice Department in its brief at 25 n.23, requires that the defendant "clearly

set forth, through the introduction of admissible evidence, the reasons for [its actions]." *Burdine*, 450 U.S. at 255. This concession by the petitioners is important, because defendant's burden is then merely to "raise[] a genuine issue of fact as to whether it discriminated against the plaintiff," *not* to "persuade the court that it was actually motivated by the proffered reasons." *Id.* at 254-55.

Thus, the *Burdine* standard, as applied to a pattern or practice case involving regression analyses, permits a defendant to meet its burden *either* (1) by showing that a plaintiff's regression is flawed in its assumptions, data or analysis; *or* (2) by demonstrating, through its own analysis, that there does not exist a significant statistical disparity. *Teamsters*, 431 U.S. at 339-40; See B. Schlei and P. Grossman, *Employment Discrimination Law* (BNA) 1323 (2d ed. 1983).

The defendant's articulation, of course, must be "clear and reasonably specific." *Burdine*, 450 U.S. at 258. Typically, this burden of specific articulation in a regression case will be met when the defendant identifies a relevant variable that is likely to have affected salary, which is omitted from the plaintiff's regression or otherwise is unaccounted for in the plaintiff's evidence. This identification of an omitted variable will "raise[] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff," *id.* at 254-55, and will also provide the plaintiff with a full and fair opportunity to demonstrate pretext at the next stage of proof. *Id.* at 258; *see Sweeney v. Research Foundation*, 711 F.2d 1179 (2d Cir. 1983); *Grano v. Department of Develop-*

ment, 699 F.2d 836, 837 (6th Cir. 1983); *White v. Vathally*, 732 F.2d 1037 (1st Cir.), 469 U.S. ——, *cert. denied*, 105 S.Ct. 331 (1984); *See also* Schlei and Grossman (Supp. 1983-84) at 250.

The two alternative methods of rebutting a plaintiff's case—identifying an omitted variable or presenting a more appropriate regression—will not result in a "nonexistent" level of proof as plaintiffs fear. Under the first method, a defendant's articulation of an omitted variable will raise more than theoretical or hypothetical objections to a plaintiff's regression. *Trout v. Lehman*, 702 F.2d 1094, 1102 (D.C. Cir. 1983), *vacated and remanded on other grounds*, 465 U.S. 1056 (1984); *Penk*, slip op. at 404. Normally, this articulation will be grounded in the facts as determined during discovery. Alternatively, if a defendant chooses to present a more appropriate regression, its model normally will focus the issues by demonstrating that the inclusion of different or additional variables may affect the outcome.

Under no circumstances, however, should the defendant be required at rebuttal to "rework plaintiff's statistics" by "incorporating the omitted factor," or to demonstrate "how specific errors" actually have affected the statistical results obtained from the plaintiff's model, as some courts have required. *See, e.g., Trout*, 702 F.2d at 1102; *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984); *Segar v. Civiletti*, 508 F. Supp. 690, 712 (D.D.C. 1981), *rev'd in part sub nom., Segar v. Smith*, 738 F.2d 1249 (D.C. Cir.), *cert. denied sub nom., Meese v. Segar*, 105 S.Ct. 2357 (1985). As noted by the Justice Department, these

cases rely on *Teamsters* for the relevant burden standards. Justice Br. at 25 n.23. "But the pattern of proof in *Teamsters* does not differ significantly from that stated in *Burdine*," a standard which should only require a showing of "inaccurate or insignificant" proof or providing a "nondiscriminatory explanation," not the more burdensome standard of persuasion. *Id.* Thus, while the employer always has the option of offering its own regression analysis to offset the plaintiff's prima facie showing, it is not required to do so.

Other policy reasons stated by this Court favor imposing the traditional *Burdine* rebuttal standard upon a defendant in a pattern or practice disparate treatment case. As this Court stated in *Burdine*, a limited evidentiary obligation will not "unduly hinder the plaintiff." 450 U.S. at 258. At the "pretext" stage, the plaintiff will have the opportunity to show that the defendant's stated reason has no basis in fact, and that its real reason was a discriminatory one, which, if proven, ends the inquiry.

This Court has noted a final reason why a plaintiff will not be disadvantaged by a defendant's limited evidentiary obligation at the rebuttal stage. "[L]iberal discovery rules applicable to any civil suit in federal court" allow the plaintiff to become aware, at an early stage, of the relevant facts making up the employer's decision. *Id; see also Penk*, slip op. at 398. This rationale is especially appropriate in the instant case, where the extensive discovery prior to the plaintiff's development of its statistical regression should have alerted it to the fact that NCAES would claim that across-the-board increases, county-

by-county disparities, and merit differentials would account for significant wage disparities.*

The *Burdine* and *Teamsters* rebuttal standard, therefore, requires the defendant to identify clearly and specifically a relevant variable omitted from a plaintiff's regression, or otherwise not accounted for by the plaintiff's evidence. This identification properly focuses the inquiry, yet reinforces plaintiff's ultimate burden of proving, either with a regression analysis or with other evidence, that the employer engaged in a pattern or practice of intentional discrimination.

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* The Justice Department argues that it "should be excused from including" the county-by-county variable in its regression even though it is a "major salary-affecting variable," because this factor was not revealed "until the brink of trial." Justice Br. at 30 & n.30. NCAES responds that depositions conducted before 1975, and again in July 1981 revealed this factor as important. *See* NCAES Br. Regardless of whether plaintiffs were *actually* notified, the argument of the Justice Department may well be legally irrelevant, since lack of actual notice does not obviate a plaintiff's responsibility to account for a relevant factor that it should have been aware of through discovery. *See* discussion, *supra*, at 8-17.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges this Court to clarify the respective burdens of proof that rest upon plaintiffs and defendants in cases involving the use of multiple regression analyses, as set forth herein.

Respectfully submitted,

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